12-19-2009

Knox v. State ex. rel. Otter Clerk's Record v. 1 Dckt. 35787

LAW CLERK

IN THE SUPREME COURT OF THE STATE OF IDAHO

Vol. 1 of 2

****

Supreme Court No. 35787

WENDY KNOX & RICHARD DOTSON,

Plaintiffs/Appellants

vs.

STATE OF IDAHO, ex rel. C.L.OTTER, Governor; BEN YSURA, Secretary of State; and LAWRANCE WASDEN, Attorney General,

Defendant/Appellant

****

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bingham.

Honorable Darren B. Simpson, District Judge, presiding.

****

Counsel for Appellants: Curt R. Thomsen, THOMSEN STEPHENS LAW OFFICES, PLLC, 2635 Channing Way, Idaho Falls, Idaho 83404

Counsel for Respondents: Attorney General, Civil Litigation Division, PO Box 83720 Boise, Idaho 83720-0010

David F. Hensley, Counsel to the Governor, PO Box 83720 Boise, Idaho 83720-0034

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35787

IN THE SUPREME COURT OF STATE OF IDAHO

WENDY KNOX and RICHARD DOTSON, Plaintiffs / Appellants, -vs- STATE OF IDAHO, ex rel. C.L. OTTER, Governor; BEN YSURA, Secretary of State; and LAWRENCE WASDEN, Attorney General, Defendants / Respondents,	)	**SUPREME COURT # 35787** **CLERK'S RECORD ON APPEAL**

****

Appeal from the District Court of the Seventh Judicial District

of the State of Idaho, in and for the County of Bingham.

Honorable Darren B. Simpson, District Judge, presiding.

****

Counsel for Appellants: Curt R. Thomsen, THOMSEN STEPHENS LAW OFFICES, PLLC, 2635 Channing Way, Idaho Falls, Idaho 83404

Counsel for Respondents: Attorney General, Civil Litigation Division, PO Box 83720 Boise, Idaho 83720-0010

David F. Hensley, Counsel to the Governor, PO Box 83720 Boise, Idaho 83720-0034

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VS.
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Date	Code	User		Judge
3/13/2008	SMIS	MPRATT	Summons Issued C.L.OTTER	Darren B. Simpson
	NCOC	MPRATT	New Case Filed - Other Claims	Darren B. Simpson
		MPRATT	Filing: A1 - Civil Complaint, More Than $1000 No Prior Appearance Paid by: Wood, T. Jason (attorney for Knox, Wendy) Receipt number: 0003913 Dated: 3/13/2008 Amount: $88.00 (Check) For: Knox, Wendy (plaintiff)	Darren B. Simpson
	SMIS	MPRATT	Summons Issued BEN YSURA	Darren B. Simpson
	SMIS	MPRATT	Summons Issued LAWRENCE WASDEN	Darren B. Simpson
	SMIS	MPRATT	Summons Issued STATE OF IDAHO	Darren B. Simpson
4/9/2008	AFFD	MPRATT	Affidavit of Service BEN YSURA	Darren B. Simpson
	AFFD	MPRATT	Affidavit of Service LAWRENCE WASDEN	Darren B. Simpson
	AFFD	MPRATT	Affidavit of Service STATE OF IDAHO	Darren B. Simpson
	AFFD	MPRATT	Affidavit of Service C.L. OTTER	Darren B. Simpson
4/14/2008	MOTN	MPRATT	Defs' Motion to Dismiss	Darren B. Simpson
	NOTC	MPRATT	Notice of Hearing	Darren B. Simpson
	HRSC	MPRATT	Hearing Scheduled (Motion to Dismiss 06/09/2008 09:30 AM)	Darren B. Simpson
4/28/2008	BRFD	MPRATT	Brief Filed - IN SUPPORT OF MOTION TO DISMISS	Darren B. Simpson
	AFFD	MPRATT	Affidavit OF CLAY R. SMITH	Darren B. Simpson
6/2/2008	BRFD	MPRATT	Memorandum in Opposition to Defs' Motion to Dismiss	Darren B. Simpson
	AMCO	MPRATT	Amended Complaint Filed	Darren B. Simpson
6/5/2008	BRFD	MPRATT	Reply Brief in Support of Ds' Motion to Dismiss	Darren B. Simpson
	MISC	MPRATT	Erratum	Darren B. Simpson
6/6/2008	NOTC	MPRATT	Notice VACATING HEARING	Darren B. Simpson
6/9/2008	HRVC	MPRATT	Hearing result for Motion to Dismiss held on 06/09/2008 09:30 AM: Hearing Vacated	Darren B. Simpson
	HRSC	MPRATT	Hearing Scheduled (Motion to Dismiss 07/08/2008 09:00 AM)	Darren B. Simpson
	MNUT	MPRATT	Minute Entry	Darren B. Simpson
	NOTC	MPRATT	Notice OF HEARING	Darren B. Simpson
7/1/2008	BRFD	MPRATT	Supplemental Memorandum in Opposition to Ds' Motion to Dismiss	Darren B. Simpson
7/7/2008	CONT	DISNEY	Continued (Motion to Dismiss 08/18/2008 09:00 AM)	Darren B. Simpson
	NOTC	MPRATT	Notice Vacating Hearing	Darren B. Simpson
7/8/2008	NOTC	MPRATT	Notice of Hearing	Darren B. Simpson
7/9/2008	NOTC	MPRATT	Notice of Hearing - Amended	Darren B. Simpson
8/11/2008	BRFD	MPRATT	Defs' Notice of Supplemental Authority	Darren B. Simpson

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Date	Code	User		Judge
8/18/2008	DCHH	MPRATT	Hearing result for Motion to Dismiss held on 08/18/2008 09:00 AM: District Court Hearing Hel Court Reporter: SANDRA BEEBE Number of transcript pages for this hearing estimated: LESS THAN 100	Darren B. Simpson
	ADVS	MPRATT	Case Taken Under Advisement MOTION TO DISMISS	Darren B. Simpson
8/19/2008	MNUT	MPRATT	Minute Entry	Darren B. Simpson
9/22/2008	MEMO	MPRATT	Memorandum Decision and Order Granting Defs' Motion to Dismiss	Darren B. Simpson
9/25/2008	CDIS	MPRATT	Civil Disposition entered for: State Of Idaho, Ex Rel C.L. Otter,, Defendant; Wasden, Lawrence, Defendant; Ysura, Ben, Defendant; Dotson, Richard Allan, Plaintiff; Knox, Wendy, Plaintiff. Filing date: 9/22/2008	Darren B. Simpson
	STAT	MPRATT	Case Status Changed: closed	Darren B. Simpson
	JDMT	MPRATT	Judgment	Darren B. Simpson
10/23/2008	APSC	MPRATT	Appealed To The Supreme Court	Darren B. Simpson
10/27/2008		MPRATT	Filing: T - Civil Appeals To The Supreme Court ($86.00 for the Supreme Court to be receipted via Misc. Payments. The $15.00 County District Court fee to be inserted here.) Paid by: Wood, T. Jason (attorney for Dotson, Richard Allan) Receipt number: 0017284 Dated: 10/27/2008 Amount: $15.00 (Check) For: Dotson, Richard Allan (plaintiff)	Darren B. Simpson
11/3/2008	MISC	MPRATT	Notice of Filing Appeal in Supreme Court / Docket #35787 Due Jan 2, 2009	Darren B. Simpson

Curt R. Thomsen, Esq., ISB #2072
T. Jason Wood, Esq., ISB #5016
THOMSEN STEPHENS LAW OFFICES, PLLC
2635 Channing Way
Idaho Falls ID 83404
Telephone (208)522-1230
Fax (208)522-1277

Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

WENDY KNOX, and RICHARD DOTSON, Plaintiffs, v. STATE OF IDAHO, ex rel. C. L. OTTER, Governor; BEN YSURA, Secretary of State; and LAWRENCE WASDEN, Attorney General, Defendants.	Case No. CV-2008-647 COMPLAINT FOR DECLARATORY AND OTHER RELIEF NOTICE: This Case is assigned to Darren B. Simpson, District Judge Fee Category: G.1 Fee: $88.00

COME NOW the Plaintiffs above-named, and for cause of action against the defendants, allege as follows:

1. The Plaintiffs in this action challenge the constitutionality of Idaho Code §§ 67-429B and 67-429C, enacted by Proposition One during the November 5, 2002, general election. Plaintiffs contend that Idaho Code §§ 67-429B and 67-429C violate the Idaho Constitution, Article III, § 20.

2. Plaintiffs Wendy Knox (hereinafter "Knox") and Richard Dotson (hereinafter "Dotson") are and at all times material were residents and citizens of the Bingham County, Idaho.

3. Defendant C. L. Otter, the Governor of the State of Idaho, is charged with upholding the Idaho Constitution and faithfully executing the laws of the State of Idaho, including Article III, § 20 of the Idaho Constitution and Idaho Code §§ 18-3808 and 18-3810. Mr. Otter is sued solely in his official capacity.

4. Defendant Ben Ysura, the Idaho Secretary of State, is charged with the administration of elections in Idaho pursuant to Title 34, Chapter 18, Idaho Code. His predecessor canvassed the voting on Proposition One and concluded that Proposition One received a majority of the votes at the November 5, 2002 election, resulting in Idaho Code §§ 67-429B and 67-429C. Mr. Ysura is sued solely in his official capacity.

5. Defendant Lawrence Wasden, Attorney General for the State of Idaho, is also charged with upholding the Idaho Constitution and faithfully executing and prosecuting the laws of the State of Idaho, including Article III, § 20 of the Idaho Constitution and Idaho Code §§ 18-3808 and 18-3810. Mr. Wasden is sued solely in his official capacity.

6. The Court has jurisdiction over this action pursuant to Idaho's Uniform Declaratory Judgment Act, Title 10, Chapter 12, Idaho Code, and Article V, § 20 of the Idaho Constitution.

7. Venue is proper pursuant to I.C. § 5-402(2) because this cause, or some part thereof, arose in Bingham County. Venue is also proper pursuant to I.C. § 5-404 because the State of Idaho is not a resident of any particular county in the State of Idaho.

8. Plaintiffs have standing to bring this action because they each have suffered injuries in fact, because there is a substantial likelihood that the judicial relief requested will prevent or redress their injuries, and because their injuries are different from those suffered by the general public, as established by the following facts, *inter alia*:

a. After enactment of Idaho Code §§ 67-429B and 67-429C and subsequent installation of slot machines at the Fort Hall Casino near Blackfoot, Idaho, both Plaintiffs became compulsive gamblers, driving the short distance from their homes to gamble on the slot machines (euphemistically called a "tribal video gaming machine") at the Fort Hall Casino, about 3 to 4 times per week.

b. Plaintiffs gambled almost exclusively at Fort Hall Casino because of its very short distance from their respective residences, compared to the next nearest places to gamble, hundreds of miles away.

c. Of all the different types of gambling available at the Fort Hall Casino, Plaintiffs played only the slot machines.

d. Because of Idaho Code §§ 67-429B and 67-429C and subsequent installation of slot machines at the Fort Hall Casino, Plaintiffs both developed clinical and devastating addictions to gambling at the Fort Hall Casino. Plaintiff Knox estimates her slot machine losses at Fort Hall Casino at about $50,000.00, and Plaintiff Dotson estimates his slot machine losses at Fort Hall Casino at about $30,000.00.

e. Because of the slot machines allowed at the Fort Hall Casino in violation of Idaho law and Idaho Constitution and their consequent gambling addiction, both plaintiffs suffered not only large monetary losses, but also incurred additional debt they otherwise would not have incurred, were subjected to intrusive and humiliating collection efforts, stress, anxiety and marital and family strife, and tremendous emotional distress. Dotson lost his house and job, and was convicted of the crime of forgery in order to obtain gambling funds, all because of his gambling addiction precipitated by Proposition One, Idaho Code §§ 67-429B and 67-429C and subsequent installation of slot machines at the Fort Hall Casino.

g. Both Plaintiffs have sought, obtained, and continue to receive treatment for their destructive gambling addictions, through Gambler's Anonymous. Dotson has also obtained counseling from a private licensed counselor for his gambling addiction.

f. If the defendants had originally upheld the Idaho Constitution and statutes prohibiting slot machines against Proposition One and Idaho Code §§ 67-429B and 67-429C, slot machines would not have been installed at Fort Hall Casino and neither Plaintiff would have suffered the harm set forth above.

g. If this Court declares Proposition One and I.C. §§ 67-429B and 67-429C to be in violation of the Idaho Constitution, Fort Hall Casino will be forced to remove its slot machines, and such casino style gambling will be much less readily available to Plaintiffs. This will make their recovery much easier and will prevent or minimize further harm to the Plaintiffs of the kind set forth above.

9. Plaintiffs have no other plain, speedy and adequate remedy to halt the harm they are suffering, other than the remedies sought herein.

10. The constitutional issues raised in this proceeding concern Idaho State law only.

11. Article III, § 20 of the Idaho Constitution, as amended in 1992, expressly prohibits gambling in Idaho. *It provides, inter alia*:

> (1) ***Gambling is contrary to public policy and is strictly prohibited except for the following***:
>
> a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation; and
>
> b. Pari-mutuel betting if conducted in conformity with enabling legislation; and
>
> c. Bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.
>
> (2) No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, baccarat, keno and ***slot machines, or employs any electronic or electromechanical imitation or simulation of any form of casino gambling***.

(Emphasis added).

12. The Idaho Legislature has, by statute, likewise prohibited gambling, making it a crime, *see* I.C. § 18-3801 and 18-3802, and prohibited slot machines in particular. *See* I.C. § 18-3810.

13. Idaho Code §§ 67-429B and 67-429C purport to authorize gambling on Indian lands in Idaho in violation of Article III, § 20 of the Idaho Constitution.

14. The gambling activities ostensibly authorized by I.C. §§ 67-429B and 67-429C do *not fall within any* of the three exceptions in subsection (1) of Article II, Section 20, Idaho Constitution.

15. Idaho Code §§ 67-429B and 67-429C purport to authorize forms of casino gambling which subsection (2) of Article III, § 20 of the Idaho Constitution, expressly prohibits.

16. Idaho Code § 67-429B, enacted pursuant to Proposition One, purports to authorize the use of "tribal video gaming machines" on Indian lands.

17. The Attorney General's Certificate acknowledged that the tribal video gaming machines as defined by I.C. § 67-429B "would be construed as slot machines or imitations or simulations of forms of casino gambling."

18. Plaintiffs agree with the Attorney General's statement quoted above, and further allege that the aforesaid "tribal video gaming machines" are "electronic or electromechanical imitations or simulations of any form of casino gambling."

19. Idaho Code §§ 67-429C, enacted pursuant to Proposition One, authorizes the unilateral amendment of state-tribal gaming compacts between the State of Idaho and the various tribes, to incorporate and permit the illegal gambling purportedly authorized by I.C. § 67-429B, in violation of Article III, Section 20 of the Idaho Constitution.

20. Plaintiffs seek a judicial declaration that I.C. §§ 67-429B and 67-429C are unconstitutional and in violation of Article III, § 20 of the Idaho Constitution.

WHEREFORE Plaintiffs respectfully pray the judgment, order and decree of the Court as follows:

1. Declaring that Idaho Code §§ 67-429B and 67-429C are unconstitutional, unlawful, and invalid under the prohibition on gambling contained in Article III, § 20 of the Idaho Constitution;

2. Enjoining the defendants from enforcing I.C. §§ 67-429B and 67-429C; and

3. Requiring the defendants to uphold and enforce Article III, § 20 of the Idaho Constitution and Idaho Code §§ 18-3808 and 18-3810.

DATED this 12 day of March, 2008.

THOMSEN STEPHENS LAW OFFICES, PLLC

By: _____
T. Jason Wood, Esq.

J:\data\CRT\6085\PLEADINGS\001 Complaint.wpd

CV-08-667

LAWRENCE G. WASDEN
Attorney General

STEVEN OLSEN
Deputy Attorney General
Chief, Civil Litigation Division
MICHAEL S. GILMORE
ISB #1625; mike.gilmore@ag.idaho.gov
CLAY R. SMITH
ISB #6385; clay.smith@ag.idaho.gov
Deputy Attorneys General
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8072

DAVID F. HENSLEY
ISB # 6600, dhensley@gov.idaho.gov
Counsel to the Governor
Office of the Governor
P.O. Box 83720
Boise, Idaho 83720-0034
Telephone: (208) 334-2100
Facsimile: (208) 334-3454

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

WENDY KNOX, and RICHARD DOTSON, Plaintiffs, v. STATE OF IDAHO, ex rel. C. L. OTTER, Governor; BEN YSURSA, Secretary of State; and LAWRENCE WASDEN, Attorney General, Defendants.	Case No. CV-2008-667 DEFENDANTS' MOTION TO DISMISS (Supporting Brief to Be Submitted Pursuant to I.R.C.P. 7(b)(3)(C))

Defendants State of Idaho *et al.* respectfully request that the complaint in this matter be dismissed pursuant to I.R.C.P. 12(b),

AND AS GROUNDS THEREFOR state that (1) dismissal under I.R.C.P. 12(b)(1) is appropriate because this Court lacks subject matter jurisdiction to adjudicate whether certain gaming machines operated by the Shoshone-Bannock Tribes comply with state law requirements; (2) dismissal under I.R.C.P. 12(b)(6) is appropriate because the complaint fails to state a claim upon which relief may be granted; and (3) dismissal under I.R.C.P. 12(b)(7) is appropriate because the complaint fails to join necessary and indispensable parties as defendants. A supporting brief will be filed within 14 days in accordance with I.R.C.P. 7(b)(3)(C).

WHEREFORE, the complaint should be dismissed under I.R.C.P. 12(b).

DATED this 14th day of April 2008.

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

STEVEN OLSON
Deputy Attorney General
Chief, Civil Litigation Division

MICHAEL S. GILMORE
Deputy Attorney General
Civil Litigation Division

DAVID F. HENSLEY
Counsel to the Governor
Office of the Governor

By: _____
CLAY R. SMITH
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on the 14th day of April 2008 I caused to be served a true and correct copy of the foregoing upon the following party by the method listed below:

CURT R. THOMSEN, ESQ.
T. JASON WOOD, ESQ.
THOMSEN STEPHENS LAW OFFICES, PLLC
2635 CHANNING WAY
IDAHO FALLS ID 83404

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
X Facsimile: 208-522-1277
☐ Statehouse Mail

CLAY R. SMITH

ORIGINAL

LAWRENCE G. WASDEN
Attorney General

STEVEN OLSEN
Deputy Attorney General
Chief, Civil Litigation Division
MICHAEL S. GILMORE
ISB #1625; mike.gilmore@ag.idaho.gov
CLAY R. SMITH
ISB #6385; clay.smith@ag.idaho.gov
Deputy Attorneys General
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8072

Attorneys for Defendants

DAVID F. HENSLEY
ISB # 6600; dhensley@gov.idaho.gov
Counsel to the Governor
Office of the Governor
P.O. Box 83720
Boise, Idaho 83720-0034
Telephone: (208) 334-2100
Facsimile: (208) 334-3454

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

WENDY KNOX, and RICHARD DOTSON, Plaintiffs, v. STATE OF IDAHO, ex rel. C. L. OTTER, Governor; BEN YSURSA, *Secretary of* State; and LAWRENCE WASDEN, Attorney General, Defendants.	Case No. CV-2008-667 BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Article III, Section 1 of the Idaho Constitution reserves to the people the right of initiative—*i.e.*, "the power to propose laws[] and enact the same at the polls independent of the legislature." In November 2002, Idaho citizens used this power to pass Proposition One, also known as the Tribal Gaming Initiative. The Initiative authorized compacts entered into between the State and federally recognized Indian tribes pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, to be amended to allow a compacted tribe to operate "tribal video gaming machines" subject to certain conditions. Section 67-429B, Idaho Code, describes the permitted form of tribal video gaming machine, while the companion § 67-429C specifies the conditions and procedures for any tribe that desired to modify its existing compact to accept the Initiative's terms without further negotiation. The complaint in this matter seeks a determination that §§ 67-429B and -429C conflict with the gambling prohibition in Article III, Section 20 of the Idaho Constitution and an order to compel defendants to take actions to enforce this constitutional provision. *See* Compl. ¶ 20. No monetary relief is requested.

The complaint should be dismissed under I.R.C.P. 12(b). The injury-in-fact alleged by plaintiffs—the proximity of their homes to tribal video gaming machines at a Fort Hall Indian Reservation casino and their compulsion to gamble on such machines—cannot be redressed without the underlying tribal-state compact with the Shoshone-Bannock Tribes ("SBT") being modified or otherwise invalidated in part. That tribe, however, is immune from unconsented suit and thus cannot be joined as a defendant. The relief sought by plaintiffs additionally would prejudice the rights of three other tribes with which Idaho has IGRA-based compacts authorizing the use of tribal video gaming machines. These basic facts, when combined with clear-cut legal

principles, lead inescapably to the conclusion that this Court lacks authority to enter the only relief—making tribal video gaming machines unavailable at the Fort Hall Casino—that will redress plaintiffs' alleged injury. The unavailability of such relief is based on two distinct grounds:

- The SBT and the three other Idaho gaming tribes are necessary and indispensable parties that cannot be joined. Dismissal is therefore required under I.R.C.P. 12(b)(7).

- Even if this action could proceed forward without the tribes' joinder as defendants, this Court cannot enter the relief requested by plaintiffs for three interrelated reasons. First, IGRA preempts the field of on-reservation gaming and in large measure leaves to States and tribes, through tribal-state compacts, the determination of what types of casino-like, or "class III," gaming can be offered and the procedures for resolving disputes over whether particular forms of gaming are permissible under a compact. Second, Idaho and the SBT have entered into a compact which, as definitively construed by the Ninth Circuit Court of Appeals, allows tribal video gaming machines. The compact further specifies an exclusive process for adjusting controversies between the parties over its application that ultimately concludes, if necessary, with litigation in federal court. Third, whether to initiate the compact's dispute resolution process is a matter committed to the Governor's discretion, and this Court lacks authority to issue relief compelling him to exercise that authority in a particular manner. Dismissal is therefore required under I.C.R.P. 12(b)(6).

STATEMENT

I. COMPLAINT'S ALLEGATIONS

Plaintiffs allege that §§ 67-429B and -429C authorize gaming proscribed under Article III, Section 20 of the Idaho Constitution and are therefore unconstitutional. Compl. ¶¶ 1, 13-15.

They claim injury from the operation of tribal video gaming machines at the SBT's Fort Hall Casino because of its proximity to their residences and their addiction to gambling on those machines. *Id.* ¶ 8.a & b. Plaintiffs state not only that they have lost substantial amounts of money as a result of this gambling and suffered emotional distress but also that plaintiff Dotson was convicted of a crime related to his efforts to acquire gambling funds. *Id.* ¶ 8.d & e. They contend that "[i]f the defendants had originally upheld the Idaho Constitution and statutes prohibiting slot machines against the Tribal Gaming Initiative and Idaho Code §§ 67-429B and 67-429C, slot machines would not have been installed at Fort Hall Casino and neither Plaintiff would have suffered [such] harm." Compl. ¶ 8.f. Most importantly for present purposes, they further allege:

> *If this Court declares Proposition One and I.C. §§ 67-429B and 67-429C to be in* violation of the Idaho Constitution, Fort Hall Casino will be forced to remove its slot machines, and such casino style gambling will be much less readily available to Plaintiffs. This will make their recovery much easier and will prevent or minimize further harm to the Plaintiffs.

Id. ¶ 8.g. Plaintiffs seek as relief a declaration that the two provisions are unconstitutional, an injunction against their enforcement, and an order requiring defendants "to uphold and enforce Article III, § 20 of the Idaho Constitution and Idaho Code §§ 18-3808 and 18-3810." *Id.* Wherefore ¶¶ 1-3. Defendants are the Governor, the Secretary of State and the Attorney General in their official capacities. *Id.* ¶¶ 3-5. To place these allegations in context, a brief review of IGRA's provisions and its implementation in Idaho is necessary.

II. FEDERAL INDIAN GAMING REGULATION

Congress enacted IGRA in 1988 to regulate gaming by federally recognized tribes on "Indian lands." Pub. L. No. 100-487, 102 Stat. 2467 (1988) (codified at 18 U.S.C. §§ 1166-1168 & 25 U.S.C. §§ 2701-2721). Those lands include Indian reservations. 25 U.S.C. § 2703(4).

IGRA separates gaming into three classes and imposes differing regulatory requirements as to each. *Id.* §§ 2703(6)-(8), 2710(a), (b) & (d); *see Seminole Tribe v. Florida*, 517 U.S. 44, 48-50 (1996) (summarizing IGRA's regulatory scheme). "Class III gaming" is a residual category for all gambling activity not encompassed by the class I and class II gaming categories. 25 U.S.C. § 2703(8). Class III gaming includes lotteries and electronic facsimiles of lotteries and most forms of machine-related gambling, including slot machines and more modern electronic or electromechanical facsimiles of any game of chance. *See, e.g.*, 25 C.F.R. §§ 502.7, 502.8 (National Indian Gaming Commission regulations defining, respectively, an "electronic, computer or other technologic aid" deemed part of class II gaming and an "electronic or electromechanical facsimile" deemed class III gaming). IGRA requires that class III gaming be conducted pursuant to a tribal-state compact approved by the Secretary of the Interior or pursuant to "procedures" adopted by the Secretary when a State has not negotiated in good faith for a class III gaming compact. 25 U.S.C. § 2710(d)(1)(C) & (d)(7)(B)(vii). A condition precedent to Secretarial approval of a compact is that the authorized class III gaming be permissible in the involved state. *Id.* §§ 2710(d)(1)(B) & 2710(d)(8)(B)(i).

Idaho Governors have entered into class III gaming compacts on the State's behalf with four of the five Idaho tribes, all of which compacts were ratified by the Legislature under Idaho Code § 67-429A and approved by the Secretary under IGRA. *See* 58 Fed. Reg. 8478 (Feb. 12, 1993) (Coeur d'Alene Tribe compact approval notice); 58 Fed. Reg. 59,926 (Nov. 10, 1993) (Kootenai Tribe compact approval notice); 60 Fed. Reg. 57,246 (Nov. 14, 1995) (Nez Perce Tribe compact approval notice); 65 Fed. Reg. 54,541 (Sept. 8, 2000) (SBT compact approval notice); 68 Fed. Reg. 1068 (Jan. 8, 2003) (Coeur d'Alene Tribe compact addendum approval notice); 68 Fed. Reg. 1068 (Jan. 8, 2003) (Kootenai Tribe compact amendment approval notice);

68 Fed. Reg. 1068 (Jan. 8, 2003) (Nez Perce Tribe compact addendum approval notice).[1] The three compact modifications approved by the Secretary in 2003 involved the tribes' exercise of their rights under the voter-approved Tribal Gaming Initiative. *See* Clay R. Smith Aff. ("Smith Aff."), Ex. 1 (Miren E. Artiach Aff.).[2]

In relevant part, § 67-429B authorizes the use of "tribal video gaming machines" by an Indian tribe if specifically allowed under a tribal-state compact and if compliant with certain technical criteria identified in subsection (1). It further declares in subsection (2) that a § 67-429B-authorized machine "is not a slot machine or an electronic or electromechanical imitation or simulation of any form of casino gambling" under Idaho law. Section 67-429C sets out a procedure allowing a tribe to amend an existing compact to provide for gaming through these machines by filing with the Secretary of State a resolution "signifying [its] acceptance" of several conditions. *Id.* § 67-429C(2). Those conditions include limitations on the permissible number of machines, contributions of five percent of "annual net gaming revenue for the support of local educational programs and schools on or near the reservation[,]" and agreement "not to conduct gaming outside of Indian lands." *Id.* § 67-429C(1)(b)-(c).[3]

The SBT, however, followed a different course to offer gambling through tribal video gaming machines. Its class III compact with Idaho authorized "any gaming activity that the State of Idaho 'permits for any purpose by any person, organization, or entity,' as the phrase is

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[1] Section 67-429A in its original form was enacted in 1993 (1993 Idaho Sess. Laws ch. 408) and authorizes the Governor to represent the State in class III gaming negotiations but subjects any proposed gaming compact to ratification by both Houses of the Legislature through a concurrent resolution. It additionally requires gaming authorized under a proposed compact to be permitted under Idaho law. Idaho Code § 67-429A(2)(a).

[2] A pre-election challenge to the Tribal Gaming Initiative's constitutionality was dismissed on standing and ripeness grounds. *In re Petition to Determine Constitutionality of Indian Gaming Initiative*, 137 Idaho 798, 53 P.3d 1217 (2002) ("*Indian Gaming Initiative*"). A post-election challenge filed before the Supreme Court also was dismissed because the Court lacked original jurisdiction. *In re Petition to Determine Constitutionality of Idaho Code Sections 67-429B and 67-429C*, No. 29226 (Idaho S. Ct. June 2, 2003) (order dismissing petition), *reh'g denied* (Oct. 16, 2003). Smith Aff., Exs. 2, 3.

[3] Section 67-429C(3) permits any tribe to negotiate "for an initial compact or a compact amendment regarding tribal video gaming machines or any other matter through a procedure other than the procedure specified in subsection (2) above or which contains terms different than those specified in subsection (1) above."

interpreted in the context of the Indian Gaming Regulatory Act." Smith Aff., Ex. 4 at § 4.a. The SBT compact provided for either or both parties to file an "initial declaratory judgment action" in United States district court to determine "what gaming the Tribes may conduct under the Act and what restrictions on the operations, if any, may be imposed by the State." *Id.*, Ex. 4 at § 5. The SBT and the State filed separate declaratory judgment actions in 2001 in the United States District Court for the District of Idaho, which were then consolidated. *Shoshone-Bannock Tribes v. Idaho*, No. CV-01-052-E-BLW (D. Idaho); *Idaho v. Shoshone-Bannock Tribes*, No. CV-01-171-E-BLW (D. Idaho). Following passage of the Tribal Gaming Initiative and Secretarial approval of the modifications to the Coeur d'Alene, Kootenai and Nez Perce compacts, the consolidated action's focus narrowed to whether the SBT compact, most particularly its most-favored-nation provision, allowed the SBT to offer gambling through tribal video gaming machines as identified in § 67-429B without compliance with the conditions specified in § 67-429C(1).[4]

The district court said yes. Smith Aff., Ex. 5. It held that Section 4 of the compact encompassed the newly-authorized tribal video gaming machines, since such gaming was being conducted by other tribes, and construed Section 24.d as "merely [an] administrative provision[] requiring the Tribe to serve upon the Idaho State Gaming Counsel a brief amendment clarifying that that Tribe is authorized to operate tribal video gaming machines." *Id.* at 14-15. The Ninth Circuit Court of Appeals affirmed the district court's judgment but gave the compact a somewhat different reading. *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006). It construed Section 24.d as "leav[ing] no room for negotiation" because "it mandates an amendment to permit one thing—the operation of the same games conducted by other tribes

[4] Section 24.d of the SBT compact provides in part that "[i]n the event any other Indian tribe is permitted by compact or final court decision to conduct any Class III games in Idaho in addition to those games permitted by this Compact, this Compact shall be amended to permit the Tribes to conduct those same additional games."

under their compacts." *Id.* at 1099. The court of appeals rejected the State's position that Section 24.d required the SBT to adhere to the conditions contained in § 67-429C and accepted by the other Idaho tribes. *Id.* at 1101 (while "[t]he other tribes agreed to accept the statutory package of amendments that were not included in their compacts[,]" the SBT "chose instead to rely on [its] Compact's existing provisions to confer the necessary permission to operate the video gaming machines"). The SBT thus was "entitled to a mandatory amendment of the Compact stating that [it is] authorized to conduct tribal video gaming." *Id.* at 1102.

APPLICABLE I.R.C.P. 12 STANDARDS

The general standard for determining motions under I.R.C.P. 12 is the same as under I.R.C.P. 56. *Gallagher v. State*, 141 Idaho 665, 668, 115 P.3d 756, 759 (2005). A district court thus must "view[] all facts and inferences from the record in favor of the non-moving party . . . [and] ask whether a claim for relief has been stated," since "[t]he issue is not whether the plaintiff will ultimately prevail, but whether the party is 'entitled to offer evidence to support the claims.'" *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 67, 28 P.3d 1006, 1010 (2001); *accord Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). This Court, however, may consider matters of public record susceptible of judicial notice at any stage of a proceeding. I.R.E. 201(f); *see Crawford v. Dep't of Corrections*, 133 Idaho 633, 636 n.1, 991 P.3d 358, 361 n.1 (1999); *cf. Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2002) ("[a] court may take judicial notice of 'matters of public record' without converting a motion to dismiss into a motion for summary judgment").

ARGUMENT

The Supreme Court has reiterated the core jurisdictional principle that a litigant must possess standing to invoke judicial intervention. Idaho law, in agreement with federal law, has

adopted a three-part standing analysis. As the Court explained almost two decades ago in the seminal *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757 (1989), two of three considerations are injury-in-fact and causation:

> "The essence of the standing inquiry is whether the party seeking to invoke the court's jurisdiction has 'alleged such a personal stake in the outcome of the controversy as to assure the concrete adversariness which sharpens the presentation upon which the court so depends for illumination of difficult constitutional questions.' As refined by subsequent reformation, this requirement of 'personal stake' has come to be understood to require not only a 'distinct palpable injury' to the plaintiff, but also a 'fairly traceable' causal connection between the claimed injury and the challenged conduct."

116 Idaho at 641, 778 P.2d at 763 (quoting *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 72 (1978) (citations omitted)). A litigant also must identify the availability of judicial relief that redresses the injury. *Young*, 137 Idaho at 104, 44 P.3d at 1159 ("[t]o satisfy the case or controversy requirement of standing, a litigant must 'allege or demonstrate an injury in fact and a substantial likelihood the relief requested will prevent or redress the claimed injury'"); *accord Gibbons v. Cenarrusa*, 140 Idaho 316, 318, 92 P.3d 1063, 1065 (2002); *Troutner v. Kempthorne*, 142 Idaho 389, 391, 128 P.3d 926, 928 (2006); *Indian Gaming Initiative*, 137 Idaho at 800, 53 P.3d at 1219. The Supreme Court additionally has made clear that the injury alleged must be specific to the complainant and, therefore, more than a generalized grievance shared by the public at large—*i.e.*, "a concerned citizen who seeks to ensure the government abides by the law does not have standing." *Miles*, 116 Idaho at 641, 778 P.2d at 763; *accord Koch v. Canyon County*, 177 P.3d 372, 374 (Idaho 2008). Existence of each element of standing—injury-in-fact, causation and redressability—constitutes a "preliminary question to be determined by [a] Court before reaching the merits of the case." *Young*, 137 Idaho at 104, 44 P.3d at 1159.

Here, plaintiffs seek to establish the requisite injury-in-fact through their alleged compulsive gambling at the Fort Hall Casino. They ask this Court to enter relief that makes it easier for them to avoid the temptation to gamble on "slot machines" by eliminating the availability of such gaming activity near their homes. In so characterizing their harm, they seek to avoid alleging a "generalized grievance" shared by citizens at large over the claimed inconsistency of §§ 67-429B and -429C with Article III, Section 20. Plaintiffs' attempted end-run around a "generalized grievance" nevertheless raises substantial difficulties under the redressability prong of the standing test, since their asserted harm can be eliminated only by the SBT actually ceasing to operate tribal video gaming machines at the Fort Hall Casino. Even were it assumed for the sake of argument that this Court determined the machines authorized under § 67-429B and operated by the SBT constitute gambling proscribed under Article III, Section 20, such ruling would not terminate the challenged gaming at the SBT casino or elsewhere in Idaho.

It is instead plain that the use of tribal video gaming machines on the SBT casino can be affected only through modification of the SBT's gaming compact. This Court, however, cannot provide that relief for both procedural and substantive reasons. Part I below addresses the procedural hurdle: The SBT and the other Idaho gaming tribes must be joined as defendants to provide effective relief to plaintiffs. Part II below addresses the substantive constraint: the Court lacks authority to effect such a modification given IGRA's and the SBT compact's comprehensive regulation of tribal gaming within the Fort Hall Reservation.

I. THIS COURT CANNOT ENTER RELIEF REDRESSING PLAINTIFFS' ALLEGED INJURY IN THE ABSENCE OF THE GAMING TRIBES' JOINDER AS A DEFENDANT, AND SUCH JOINDER IS PRECLUDED BY THEIR SOVEREIGN IMMUNITY

Federally-acknowledged Indian tribes are immune from suit by Idaho or its citizens in any court absent their consent or congressional abrogation of that immunity. *E.g., Kiowa Tribe v. Mfg. Techns., Inc.*, 523 U.S. 751, 754 (1998); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991). Plaintiffs have not named the SBT or the three other Idaho gaming tribes and, in light of tribal sovereign immunity, could not do so even if they so desired. They nonetheless seek relief that, to be effective, must adversely adjudicate the SBT's right to operate tribal video gaming machines under its compact. The issue accordingly becomes whether this Court may award such relief consistently with I.R.C.P. 19's requirements concerning joinder of indispensable parties.

Rule 19(a) is derived from Federal Rule of Civil Procedure 19(a). Federal courts, whose decisions are given substantial weight in determining the Idaho rule's proper application,[5] have adopted a three-step test to determine whether an absent party should be joined and, if so, whether the action should be permitted to continue when joinder is not feasible:

> Application of Rule 19 involves "three successive inquiries." [¶] First, the court must determine whether a nonparty should be joined under Rule 19(a). We and other courts use the term "necessary" to describe those "[p]ersons to [b]e [j]oined if [f]easible." . . . [¶] If an absentee is a necessary party under Rule 19(a), the second stage is for the court to determine whether it is feasible to order that the absentee be joined. . . . [¶] Finally, if joinder is not feasible, the court must determine at the third

[5] As the Supreme Court explained in *Chacon v. Sperry Corp.*, 111 Idaho 270, 723 P.2d 814 (1986):

> Part of the reason for adopting the Federal Rules of Civil Procedure in Idaho, and interpreting our own rules adopted from the federal courts as uniformly as possible with the federal cases, was to establish a uniform practice and procedure in both the federal and state courts in the State of Idaho. We recently adopted the Federal Rules of Evidence as the rules of evidence in Idaho in order to obtain uniformity in the trial practice in both the state and federal courts. Lack of uniformity in the rules of procedure, as well as rules of evidence, creates problems for both the courts and the practitioners. These problems can be avoided by interpreting our rules of civil procedure in conformance with the interpretation placed upon the same rules by the federal courts.

111 Idaho at 275, 723 P.2d at 819.

> stage whether the case can proceed without the absentee, or whether the absentee is an "indispensable party" such that the action must be dismissed. . . . Rule 19 uses "the word 'indispensable' only in a conclusory sense, that is, a person is 'regarded as indispensable' when he cannot be made a party and, upon consideration of the factors [in Rule 19(b)], it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it."

Wilbur v. Locke, 423 F.3d 1105, 1111-12 (9th Cir. 2005) (citation omitted).[6] Rule 19 issues frequently arise in connection with Indian tribes. *E.g., Yashenko v. Harrah's NC Casino Co.*, 446 F.3d 541, 551-53 (4th Cir. 2006) (tribe was indispensable party in terminated employee's suit against casino management company); *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002) (tribe was indispensable party in suit challenging governor's authority to renew compacts); *see generally* Matthew L.M. Fletcher, *The Comparative Rights of Indispensable Sovereigns*, 40 Gonz. L. Rev. 1 (2004-2005) (discussing application of Rule 19-related joinder where rights of Indian tribes may be affected).

Wilbur and *American Greyhound* are particularly instructive concerning the proper application of Rule 19 under the circumstances here. The *Wilbur* plaintiffs sought to enjoin the Washington governor and various state revenue department officials from implementing a cigarette tax compact with a tribe on the ground that arrangement would violate the Indian Commerce Clause and various federal statutes. 423 F.3d at 1104-05. The Ninth Circuit had no difficulty concluding that the absent tribe was a necessary party, since it had a legally protected interest in the involved compact's benefits and since the plaintiffs were required to show "the illegality of the Compact in order to succeed on the merits of any of their claims." *Id.* at 1112. Recognizing that the compact was contractual in nature, the court pointed to various decisions standing for the "'fundamental principle' that 'a party to a contract is necessary, and if not

[6] The present formulation of I.R.C.P. 19(a) includes as separate subparagraphs what is set out in Fed. R. Civ. P. 19(a) through (d). Fed. R. Civ. P. 19(a)(1) is therefore identical to I.R.C.P. 19(a)(1), but the references in *Wilbur* to *Fed. R. Civ. P. 19(b) find their* corollary in I.R.C.P. 19(a)(2).

susceptible to joinder, indispensable to litigation seeking to decimate that contract.'" *Id.* at 1113. The Ninth Circuit rejected the contention that state officials could represent the tribe's interests adequately, noting that "the Tribe and the state have been adversaries in disputes over the subject of the [compact] in the past (indeed, resolution of a 'long-standing disagreement' regarding cigarette taxation was one of the purposes recited in the Compact's preamble)" and that "the state owes the Tribe no trust duty that might ensure vindication of the Tribe's interest." *Id.* To accept the plaintiffs' adequate-representation argument, the court added, would negate the "general rule" that all parties to a contract—there the tribal-state compacts—are necessary parties to an action whose aim is to compromise a contract in some material respect. *Id.* at 1114.

The *Wilbur* court turned then to the Rule 19(b) considerations and held the tribe indispensable.[7] It noted the obvious impairment of the tribe's interest if the compact were determined to be unlawful and the impossibility of shaping protective provisions in a judgment given the fact that plaintiffs "want nothing less than nullification of the Compact." 423 F.3d at 1114. The lack of any available shaping relief also carried with it the conclusion that an adequate judgment could not be entered because any decree would prejudice the tribe's interest in the compact's integrity. Only the fourth consideration—"whether [the plaintiffs] will have an adequate remedy if the action is dismissed"—weighed against an indispensability finding, but the court observed that "we have 'regularly held that the tribal interest in immunity overcomes the

[7] Rule 19(b), Fed. R. Civ. P., reads:

> When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> (2) the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures;
> (3) whether a judgment rendered in the person's absence would be adequate; and
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

lack of an alternative remedy or forum for the plaintiffs.'" *Id.* at 1115. Finally, it rejected the plaintiffs' reliance on the "public rights exception," reasoning that the doctrine does not apply where the litigation could "destroy the legal entitlements of the absent parties." *Id.* (internal quotation marks omitted). The plaintiffs' claim sought precisely that result, since "[t]he Tribe would lose valuable contractual benefits if the Compact was held invalid."

While *Wilbur* involved a tax agreement, *American Greyhound* arose from a suit filed by racetrack operators challenging a statute that empowered the Arizona governor to negotiate new, or to extend existing, class III gaming compacts with various tribes "[n]otwithstanding any other law." The district court enjoined the governor from engaging in either action because, in its view, the state statute which authorized her to negotiate the compacts embodied an unlawful delegation of legislative power insofar as it exempted such compacts from compliance with other state statutory constraints on gambling. *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1066-67, 1069-72 (D. Ariz. 2001), *rev'd*, 305 F.3d 1015 (9th Cir. 2002). The district court further held that various types of "casino" gaming were unlawful under Arizona law. *Id.* at 1063-66.

In reversing, the Ninth Circuit did not reach the substantive issues because it concluded that the absent tribes were necessary and indispensable parties under Rule 19. The court of appeals found that the tribes were necessary parties under Rule 19(a)(2)(i) because, as a practical matter, the relief entered by the lower court impeded the tribes' ability to protect their contracted-for compact interests; *i.e.*, "[b]efore this litigation, the tribes had a right to renewal if the Governor was willing to leave the compacts in effect; after the litigation, termination was the only option." 305 F.3d at 1023. It added later:

> The district court's ruling that state law prohibits casino-type gaming, and its consequent ruling that such gaming by Indian tribes violates IGRA, present another

> problem. Although the district court enjoined only the execution of future compacts or the extension of existing ones, its order amounts to a declaratory judgment that the present gaming conducted by the tribes is unlawful. It is true that the tribes are not bound by this ruling under principles of res judicata or collateral estoppel because they are not parties, but their interests may well be affected *as a practical matter* by the judgment that its operations are illegal. . . . The sovereign power of the tribes to negotiate compacts is impaired by the ruling. . . . Moreover, enforcement authorities may consider themselves compelled to act against the tribes.

Id. at 1024 (citations omitted). The court of appeals next addressed the Rule 19(b) factors and held that (1) the tribes would suffer "enormous" prejudice from the required compact terminations; (2) the prejudice could not ameliorated through remedial shaping; (3) any judgment in the tribes' absence would not be adequate from the plaintiffs' perspective unless it compromised tribal interests; and (4) the tribes' immunity from suit took precedence over the unavailability of any other forum for the plaintiffs' grievance in the event of dismissal. *Id.* at 1025. It also found the plaintiffs' invocation of the public rights exception unavailing. Although recognizing that "[t]he general subject of gaming may be of great public interest," the court deemed dispositive the fact that "[t]he plaintiffs sought th[e] injunction to avoid competitive harm to their own operations." *Id.* at 1026. "[T]he rights in issue between the plaintiffs in this case, the tribes and the state," in short, "are more private than public." *Id.*

Wilbur and *American Greyhound* leave no doubt about the necessary and indispensable party status of not only the SBT but also the three other tribes whose compacts permit tribal video gaming machines. First, no legitimate question exists that the principal relief sought by plaintiffs—a declaration of §§ 67-429B and -429C's unconstitutionality and that the games actually operated by the SBT are in violation of the Idaho Constitution—could "as a practical matter" impair the tribes' contractual interest in offering such gaming. I.R.C.P. 19(a)(1). IGRA, as explained above, conditions Secretarial authority to approve a class III compact on its being "located in a State that permits such gaming for any purpose by any person, organization, or

entity." 25 U.S.C. § 2710(d)(1)(B); *see, e.g., Rumsey Indian Rancheria v. Wilson*, 41 F.3d 421, 425 (9th Cir. 1994) ("where a state does not 'permit' gaming activities sought by a tribe, the tribe has no right to engage in these activities, and the state thus has no duty to negotiate with respect to them"), *amended*, 64 F.3d 1250 (9th Cir. 1994) and 99 F.3d 321 (9th Cir. 1996); *accord Coeur d'Alene Tribe v. Idaho*, 51 F.3d 876 (9th Cir. 1995) (*per curiam*). A determination that the gaming sanctioned under § 67-429B is proscribed under Article III, Section 20 thus could lead to controversy over the tribal video gaming now authorized under the various compacts. *See San Pasqual Band of Mission Indians v. California*, No. 06cv0988-LAB, 2007 WL 935578, at *11 (S.D. Cal. Mar. 20, 2007) (where one tribe sought determination concerning permissible number of gaming devices under a "model compact" provision largely identical to provisions in other model compacts, tribes signatory to model compacts were necessary parties under Fed. R. Civ. P. 19(a)(1) because, *inter alia,* "a determination of the maximum number of licenses available collectively to all the 1999 Compact tribes is uniformly applicable to all through a formula common to all those Compacts"); *cf. Srader v. Verant*, 964 P.2d 82, 90 (N.M. 1998) (tribes were indispensable parties under state procedural rule identical to Fed. R. Civ. P. 19 in action seeking to compel enforcement of state gambling prohibitions with respect to pre-compact tribal gaming; "[t]his requested relief would halt the exchange of money upon which the tribes rely for business at their casinos"). The tribes have an obvious interest in any judicial proceeding that has as its goal declaring unconstitutional a voter initiative that not only sanctioned a form of gaming for their specific use and benefit but also has been serving that objective for years.

Plaintiffs concede their intent to visit prejudice directly on the SBT, and indirectly on the remaining tribes, since it is only through cessation of the video gaming that their alleged interest in controlling compulsive "slot machine" gambling can be furthered. Necessary party status for

the four tribes plainly exists. The State, moreover, would be exposed to a "substantial risk of incurring . . . inconsistent obligations" within the reach of I.R.C.P. 19(a)(1) because plaintiffs seek relief that would impose obligations on defendants which conflict with the Ninth Circuit's judgment authorizing the SBT to add tribal video gaming machines to its IGRA-sanctioned class III gaming compact. The same risk of inconsistency exists as to the other tribes' gaming compacts, which are valid under IGRA now and would remain so regardless of how plaintiffs' claim is resolved.

Second, any reasonable assessment of the four I.R.C.P. 19(a)(2) considerations requires the conclusion that the tribes are indispensable. The threshold consideration—the possibility of prejudice to the absent party—has been discussed and strongly counsels indispensability. There additionally appear no "protective measures" that could mitigate this prejudice; again, plaintiffs unabashedly seek to shut down video gaming at the Fort Hall Casino on grounds that would cast legal doubt on the identical gaming permitted under the north Idaho tribes' compacts. Any meaningful judgment rendered in plaintiffs' favor to address their purported injury would require the SBT to cease operating tribal video gaming machines; anything less leaves them in precisely the same *practical* position as they are now, *i.e.*, living in proximity to allegedly available "slot machine" gaming. Here, absent the SBT's joinder, plaintiffs simply cannot secure a judgment that redresses their asserted injury-in-fact. *See Yashenko*, 446 F.3d at 553 ("any judgment entered without joining the Tribe would be inadequate because it would bind only Yashenko and Harrah's; the Tribe would remain free to enforce the tribal preference policy on its reservation and through its contractual relations"). As is often the result where tribal immunity from suit is the basis for the infeasibility of joinder, plaintiffs may have no alternative forum, but the lack of one simply means that they must employ non-judicial means to control their claimed gambling

compulsion. They are situated no differently in this respect than the complainants in *Wilbur* and *American Greyhound.*

Last, the public rights exception has no play here. Plaintiffs advance a *sui generis* theory of injury for the precise purpose of avoiding the "generalized grievance" characterization. But for their purported and quite individualized addiction to "slot machine" gambling, plaintiffs would not be before this Court. The complaint, therefore, should be dismissed under I.R.C.P. 12(b)(7).

II. THIS COURT CANNOT GRANT PLAINTIFFS RELIEF AFFECTING THE FORT HALL CASINO'S OPERATIONS EVEN IF IT COULD PROCEED FORWARD WITHOUT THE IDAHO GAMING TRIBES AS PARTIES

This Court lacks authority to enter the relief requested by plaintiffs even if the SBT and the other compacted Idaho tribes were not indispensable parties under I.R.C.P. 19: (1) IGRA preempts plaintiffs' request that defendants be compelled "to uphold and enforce Article III, § 20 of the Idaho Constitution and Idaho Code §§ 18-3808 and 18-3810" (Compl. Wherefore ¶ 3); (2) the exclusive process for addressing any disputes over gaming provided at the Fort Hall Casino is prescribed in Section 18.a of the SBT compact; and (3) the Court has no power to require the Governor to initiate the Section 18.a dispute resolution process. IGRA, in other words, fully occupies the field of gaming within Indian reservations and leaves to States and tribes determination of, *inter alia*, the types and conditions under which class III games may be offered and the methods by which disputes under tribal-state compacts are resolved. The SBT and Idaho have used that authority not only to authorize tribal video gaming machines under their compact but also to lay out quite specific processes for dispute resolution. Plaintiffs may not interpose themselves into a federal law-sanctioned sovereign-to-sovereign relationship either

through the relief actually sought in the complaint or, alternatively, through efforts to control gubernatorial discretion in administering the State's interests under the compact.

A. IGRA's Preemptive Scope

No factual dispute exists that the Fort Hall Casino is located within the Fort Hall Reservation set aside for the SBT's occupancy and that its operations are subject to regulation under IGRA. *See* Smith Aff., Ex. 4 at § 2.h & j (SBT compact's definitions of, respectively, "gaming facility" and "Indian lands"). Relevant case law equally leaves no dispute that IGRA occupies the field of Indian lands-related gaming. The leading decision in this regard is *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996). The *Gaming Corp.* litigation arose from various federal- and state-law claims by a casino management company that a law firm had engaged in improper conduct while representing a tribe in a license application process before a tribal gaming commission. The case began in state court but was removed to federal district court and then remanded back to state court after the federal claims were dismissed. 88 F.3d 539-41. The court of appeals reversed the remand order, agreeing with the defendant law firm that IGRA "completely preempts the field of Indian gaming regulation." *Id.* at 539.

In so holding, the *Gaming Corp.* court examined "the text and structure of IGRA, its legislative history, and its jurisdictional framework" and reasoned that, absent agreement in the compact itself, no room existed for independent operation of state law:

> It is a long- and well-established principle of Federal-Indian law . . . that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands. . . . [¶] The legislative history indicates that Congress did not intend to transfer any jurisdictional or regulatory power to the states by means of IGRA unless a tribe consented to such a transfer in a tribal-state compact. . . . [¶] Congress thus left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact.

88 F.3d at 545-46. The Eighth Circuit reiterated the complete-preemption rule several years later in *Missouri ex rel. Nixon v. Coeur d'Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999), where it explained that, in *Gaming Corp.*, "[w]e concluded that at least some of the [state law] claims were preempted because they potentially interfered with the Tribe's casino licensing process, a process mandated and regulated by the IGRA." *Id.* at 1108. The suit that was removed in *Nixon* stood on a different footing, since it was unclear whether the involved state-law claim—an action by the Missouri attorney general to enforce state statutes against a tribal Internet gaming operation—related to conduct not on Indian lands and thus not subject to IGRA. *See id.* ("[o]ur conclusion in [*Gaming Corp.*] that the IGRA preempted claims interfering with tribal gaming must be viewed in the context of an IGRA-regulated licensing of casino gaming that was indisputably conducted solely on Indian lands"). Other courts have reached the same conclusion with respect to state law-grounded claims that relate directly to the conduct of IGRA-sanctioned gaming. *See County of Madera v. Picayune Rancheria of Chukchansi Indians*, 467 F. Supp. 2d 993, 997 (E.D. Cal. 2006) (state court has no jurisdiction to consider county's contention that casino did not comply with county environmental requirements because compact contained no provision for county's exercise of such authority).[8]

Here, plaintiffs' professed goal is to eradicate a form of gaming authorized under the SBT compact. Compl. ¶ 8.g. The holding in *Gaming Corp.* dictates that their request for a mandatory injunction compelling defendants to enforce Article III, Section 20 and Idaho Code §§ 18-3808

[8] *Srader v. Verant, supra*, does not support a different conclusion in a post-compact environment. The New Mexico Supreme Court held there that IGRA did not preempt state gambling statutes because, in relevant part, "gaming compacts are the vehicles that give force to IGRA's potential preemptive power." 964 P.2d at 88. "Without some clear manifestation of an intention to surrender jurisdiction within its territorial jurisdiction, alleged violations of New Mexico law remain within this Court's control." *Id.* The Idaho Legislature, however, ratified the SBT compact. *See* Pt. II *infra*. The federal courts have held, moreover, that the compact expressly permits tribal video gaming machines, and, in any event, the State has no criminal jurisdiction under Section 17 with respect to the SBT's gaming activities.

and -3810 with respect to the use of tribal video gaming machines at the Fort Hall Casino falls squarely within IGRA's preemptive ambit.[9] Even if defendants had direct enforcement responsibility under §§ 18-3808 and -3810—and they do not—this Court lacks authority to direct them to exercise that authority as to IGRA-regulated gaming on the Fort Hall Reservation. State gaming law, in short, has no independent application to the tribal gaming operations.

B. SBT Compact's Remedial Exclusivity

On April 12, 2000, the Governor signed into law the Idaho Legislature's ratification of the Shoshone-Bannock Compact and waiver of the State's Eleventh Amendment immunity from suit in Federal Court regarding certain issues under the Compact. *See* 2000 Idaho Sess. Laws ch. 220. Section 1 of that session law explained why the parties had not designated State court or Tribal court as forums to resolve issues of legality of games under the Compact:

> It is the strong public policy of the state of Idaho to forbid all forms of gambling, including casino-style gambling except a state lottery, pari-mutuel betting, and charitable bingo and raffle games. Nothing contained in this act can or should be construed in contravention of that policy. The tribes believe that they are entitled to conduct gaming operations beyond what the state believes is legally permissible.
>
> *It is necessary to have a neutral judicial forum available to resolve these issues and to provide a framework for the resolution of future issues that may arise with respect to tribal gaming. To that end, the parties have agreed to resolve these legal disputes in federal court.* The resolution of such disputes in federal court requires legislation authorizing the state to waive its Eleventh Amendment immunity from suit by the tribes in federal court. The Shoshone-Bannock Tribes have agreed to adopt a tribal ordinance authorizing the waiver of their claims of sovereign immunity with respect to such disputes. [Emphasis added.]

The compact, in turn, contains three provisions requiring arbitration or suit in federal court to resolve which gaming activities are permitted under state law or to resolve other compact-related

[9] Section 18-3808 directs "[e]very prosecuting or county attorney, sheriff, constable or police officer, [to] inform against and diligently [to] prosecute persons whom they have reasonable cause to believe offenders against the provisions of this chapter, and every such officer refusing or neglecting so to do is guilty of a misdemeanor." Section 18-3810 makes it a misdemeanor, with certain exceptions for antique slot machines, "for any person to use, possess, operate, keep, sell, or maintain for use or operation or otherwise, anywhere within the state of Idaho, any slot machine of any sort or kind whatsoever." Section 67-429B(2) excludes tribal video gaming machines from the reach of this provision.

disputes.

As a threshold matter, Section 6.b of the compact authorizes either or both the State and the SBT to file an initial declaratory judgment action in federal district court to resolve the parties' legal disputes about what games the SBT may lawfully operate. The parties employed that process to resolve the compact-amendment disagreement arising in the wake of Proposition One's passage. Next, Section 6.c provides for arbitration or additional suit in federal court, if necessary, to implement any decision arising from the initial declaratory judgment action. The fact that tribal video gaming machines are being operated at the Fort Hall Casino indicates that resort to the Section 6.c process proved unnecessary. Last, Section 18.a sets out a "General Dispute Resolution" process that "*shall apply exclusively* for the resolution of issues arising under the provisions of this Compact." (Emphasis added.) The upshot is that when a dispute over the compact's application exists, the parties *must* engage in informal dispute resolution (Section 18.a(1)), and, to the extent necessary, arbitration (Section 18.a(2)) and federal court suit (Section 18.a(3)).

Instantly, if the State desired to argue that the Tribal Gaming Initiative's authorization of tribal video gaming machines conflicted with Article III, Section 20 and thereby affected the SBT's right to operate those machines at the Fort Hall Casino, the procedures in Section 18.a for informal dispute resolution, arbitration and federal court resolution provide the only remedy. The compact's process, again, is *exclusive* and recognizes no distinctions based on whether the dispute has a compact, statutory or constitutional source. The parties' choice of process is, as with other components of a tribal-state class III gaming compact, the product of IGRA-derived and -protected choice. IGRA accordingly provides that a tribal-state compact "may include provisions relating to . . . the allocation of criminal and civil jurisdiction between the State and

the Indian tribe necessary for the enforcement of . . . laws and regulations." 25 U.S.C. § 2710(d)(3)(C)(ii). After a compact has taken effect, in other words, state authority over tribal gaming is determined by the compact. *See Hatcher v. Harrah's NC Casino Co., L.L.C.*, 565 S.E.2d 241, 243 (N.C. Ct. App. 2002) ("Congress has expressly left certain questions of jurisdiction to be decided by the tribe and the state").

That the compact-derived procedure enjoys precisely the same insulation from state law jurisdiction as the claims at issue in *Gaming Corp.* is reflected in various federal and state court decisions. Examples include:

- *Doe v. Santa Clara Pueblo*, 154 P.3d 644, 654 (N.M. 2007) (IGRA authorized a tribe to consent to state court jurisdiction with respect to casino-related personal or property injuries; "instead of Congress allocating jurisdiction between the tribes and states, the compact provision allowed the tribes and the states to negotiate and decide for themselves the division of civil, criminal, and regulatory responsibility").

- *Hatcher v. Harrah's NC Casino Co., L.L.C.*, 610 S.E.2d 210, 214-15 (N.C. Ct. App. 2005) (state court was bound by a compact's allocation of civil and criminal jurisdiction between the State and the tribe, and a state court lacked jurisdiction over a casino patron's claim of improper denial of winnings in the absence of a compact grant of authority).

- *Kizis v. Morse Diesel Int'l, Inc.*, 794 A.2d 498, 503-06 (Conn. 2002) (where a compact with the tribe provided a mechanism to resolve tort claims arising out of tribal gaming facilities, a state court lacked subject matter jurisdiction for such tort claims because the State had agreed that a tribal gaming disputes court would be the exclusive forum for such claims).

- *Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, 88 Cal. Rptr. 2d 828, 840-42 (Ct. App. 1999) (IGRA preempted former tribal casino manager's wrongful

termination suit against tribal gaming operations and deprived the state court of subject-matter jurisdiction).

For present purposes, these decisions mean that the sole method available for adjudicating the types of gaming that may legally be offered at the Fort Hall Casino is through Section 18.a processes. Plaintiffs' action here is not provided for under the Section 18.a process.

C. Lack Of Judicial Authority To Enter Mandatory Injunctive Relief

Plaintiffs' request that defendants be directed "to uphold and enforce Article III, § 20 of the Idaho Constitution and Idaho Code §§ 18-3808 and 18-3810" with respect to the use of tribal video gaming machines at the Fort Hall Casino asks this Court to require an action inconsistent with federal law for the reasons discussed in Part II.A. Direct application of those provisions to the casino operations is foreclosed by IGRA. Their request further asks the Court to ignore the Ninth Circuit's determination that, since "[t]he Coeur d'Alene, Kootenai, and the Nez Perce Tribes all legally operate tribal video gaming machines" by virtue of the authorization in §§ 67-429B and -429C, the most-favored-nation provision in Section 24.d entitled the SBT to engage in the same form of gaming. *SBT*, 465 F.3d at 1098. Consequently, whether measured by its literal terms—which results in IGRA-based preemption—or with reference to IGRA's requirements as embodied in the *SBT* decision, the mandatory injunction relief sought by plaintiffs plainly is foreclosed.

Although the mandatory injunctive relief as currently pled in the complaint is unavailable, the result here would not change even if plaintiffs had taken into account the limitations imposed by federal law on this Court's remedial authority. The exclusive process for the State to assert a dispute over the use of tribal video gaming machines, as explained above, lies in Section 18.a. The question thus becomes whether mandatory injunctive relief could issue

against the Governor compelling him to initiate that process for the purpose of modifying the compact. *See* Idaho Code § 67-429A.[10] Under settled standards, such relief "will issue to a party who has a clear legal right to have an act performed if the officer against whom the writ is sought has a clear duty to act and if the act be ministerial and not require the exercise of discretion." *Savier v. Richey*, 96 Idaho 413, 415, 529 P.2d 1285, 1287 (1974).[11] The Supreme Court additionally has held that where a decision-maker possesses discretion, mandamus may be available in unusual circumstances—*i.e.*, where it is shown both that "such abuse [is] clearly apparent" and that "'such officer . . . has so far departed from the line of his duty under the law that it can be said he has in fact so far abused such discretion that he has neglected or refused to exercise any discretion.'" *Kolp v. Bd. of Trustees*, 102 Idaho 320, 323 n.1, 629 P.2d 1153, 1156 n.1 (1981). The Court thus stressed that "the standard of proof is high and this exception to the rule is severely limited." *Id.*; *accord Rogers v. Gooding Pub. Jnt. Sch. Dist.*, 135 Idaho 480, 483, 20 P.3d 16, 19 (2001); *Brady v. City of Homedale*, 130 Idaho 569, 571-72, 944 P.2d 704, 706-07 (1997). Here, even were this Court to determine that §§ 67-429B and -429C conflict with Article III, Section 20, the Governor would have no clear, nondiscretionary duty to invoke the dispute

[10] Neither the Secretary of State nor the Attorney General has any statutory duties relevant to compact-enforcement decisions. No relief, whether declaratory or injunctive in nature, may issue against them.

[11] The Idaho Supreme Court does not appear to have reached the issue, but other courts recognize that where a court is asked to require a public officer or agency to perform a specific function for the purpose of altering the *status quo*, mandamus standards apply. *See, e.g., AlliedSignal, Inc. v. City of Phoenix*, 182 F.3d 692, 697 (9th Cir. 1999); *Or. Natural Res. Council v. Harrell*, 52 F.3d 1499, 1508 (9th Cir. 1995); *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986); *Nat'l Wildlife Fed'n v. United States*, 626 F.2d 917, 918 (D.C. Cir. 1980); *see generally* 43A CJS *Injunctions* § 4 (2002) ("[M]andamus, and not an injunction, is ordinarily the proper remedy where nothing is sought but the enforcement of a legal duty. Under some circumstances, however, a mandatory injunction will issue to compel the performance of a duty of this character if, for any reason, mandamus is not available. Thus, a mandatory injunction is equivalent to mandamus and governed by the same considerations") (footnotes omitted). The key consideration is whether the injunction seeks to restore or maintain the *status quo* or whether, as is the situation here, the complainant seeks to undo it. 42 Am. Jur. 2d *Injunctions* § 6 (2004) ("While injunction is a remedy to restrain the doing of injurious acts or, in its mandatory form, to require the undoing of injurious acts and the restoration of the status quo, mandamus commands the performance of a particular duty that rests upon the defendant, or respondent, by operation of law or because of official status. . . . A court may nonetheless sometimes issue an injunction that is mandatory in form and that may be equivalent to, or more nearly approach, the common law writ of mandamus, such as when an injunction directs an officer or board to perform an act required of the person or entity by law") (footnotes omitted).

resolution process in Section 18.a. Several considerations dictate that conclusion.

First, regardless of how the merits of plaintiffs' claim are decided, under the SBT compact with the State, tribal video gaming machines are a lawful form of gambling at the Fort Hall Casino. The Secretary of Interior approved the compact under IGRA in 2000, and the federal court litigation terminated with a judgment allowing the SBT to modify that agreement to include video gaming machines. This Court possesses no power to undo either the Secretarial approval—which is subject to challenge, if at all at this time, only pursuant to the judicial review procedures of the Administrative Procedure Act, 5 U.S.C. § 701-706—or the Ninth Circuit judgment insofar as it established the legality of the tribal video gaming machines under the compact upon amendment. The Governor has no obligation to seek amendment of an otherwise lawful agreement.

Second, a final judgment in the federal court litigation holds that tribal video gaming machines are a permissible form of gaming under the SBT compact. *Res judicata* in the form of federal-common-law claim preclusion would apply to any legal controversy between the State and the SBT over that issue because "the earlier suit: (1) reached a final judgment on the merits; (2) involved the same cause of action or claim; and (3) involved identical parties or privies." *Leon v. IDX Systems Corp.*, 464 F.3d 951, 962 (9th Cir. 2006). That the validity of the Tribal Gaming Initiative provisions under Article III, Section 20 was not an issue in the prior litigation makes no difference in this regard, since the "claim" in question was whether the SBT was entitled under the compact to offer § 67-429B-authorized gaming. *E.g.*, *Sidney v. Zah*, 718 F.2d 1453, 1458 (9th Cir. 1983); *see generally Restatement (Second) of Judgments* § 25 (1982) ("Having been defeated on the merits in one action, a plaintiff sometimes attempts another action seeking the same or approximately the same relief but adducing a different substantive law

premise or ground. This does not constitute the presentation of a new claim when the new premise or ground is related to the same transaction or series of transactions, and accordingly the second action should be held barred").

Finally, there are public policy issues that must play an integral role in any determination to invoke the Section 18.a process and underscore the discretionary nature of the attendant decision-making. *One issue stands out immediately.* The Ninth Circuit relied on the most-favored-nation provision of the SBT compact for its holding. The unavoidable logic of its rationale is that, before seeking termination of tribal video gaming at the Fort Hall Casino, the State must first secure similar termination of such gaming by the Coeur d'Alene, Kootenai and Nez Perce Tribes. Not only significant legal difficulties exist in achieving that condition precedent, but very significant policy consequences—including disruption of settled economic expectations and planning premised on those expectations—*also could play an important role in the Governor's decision.* It is precisely these types of discretionary policy choices that have led the United States Supreme Court to reject, on prudential grounds, efforts to have the federal judiciary control prosecutorial or other statutory enforcement discretion. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion"); *see also Sierra Club v. Whitman*, 268 F.3d 898, 903 (9th Cir. 2001) (declining to review agency decision not to take enforcement action under the Clean Water Act because, *inter alia*, "[t]o leave enforcement decisions to the discretion of the Administrator is not to relieve the [Environmental Protection Agency] of its mission to achieve compliance with the Act; it simply means that the EPA must decide, within the limits set by Congress, the most effective way to accomplish the objectives of the Act as a whole"); *Clementson v. Brock*, 806 F.2d 1402, 1404 (9th Cir. 1986)

("[a]s a general rule, when an agency determines not to start enforcement proceedings, there is a presumption against judicial review of the decision"). The Governor is entitled to weigh the costs and likelihood of success of such suits and cannot be compelled by mandamus to order the pursuit of such suits.

Under these circumstances, the prerequisites to issuance of a mandatory injunction are absent. Any decision concerning whether to seek modification of the SBT compact through the procedures in Section 18.a is unquestionably discretionary in nature, and a determination to leave otherwise legal gaming activities in place, particularly in light of years of litigation over and final federal court judgment concerning the permissible scope of those activities, can hardly be characterized as "depart[ing] from the line of . . . duty under the law."

CONCLUSION

Defendants' motion to dismiss should be granted.

DATED this 24th day of April 2008.

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

STEVEN OLSON
Deputy Attorney General
Chief, Civil Litigation Division

MICHAEL S. GILMORE
Deputy Attorney General
Civil Litigation Division

DAVID F. HENSLEY
Counsel to the Governor
Office of the Governor

By: _____
CLAY R. SMITH
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on the 24th day of April 2008 I caused to be served a true and correct copy of the foregoing upon the following party by the method listed below:

CURT R. THOMSEN, ESQ. T. JASON WOOD, ESQ. THOMSEN STEPHENS LAW OFFICES, PLLC 2635 CHANNING WAY IDAHO FALLS ID 83404	X U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Federal Express ☐ Facsimile: 208-522-1277 ☐ Statehouse Mail

CLAY R. SMITH

ORIGINAL

LAWRENCE G. WASDEN
Attorney General

STEVEN OLSEN
Deputy Attorney General
Chief, Civil Litigation Division
MIKE GILMORE
ISB #1625; mike.gilmore@ag.idaho.gov
CLAY R. SMITH
ISB #6385; clay.smith@ag.idaho.gov
Deputy Attorneys General
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8072

Attorneys for Defendants

DAVID F. HENSLEY
ISB # 6600, dhensley@gov.idaho.gov
Counsel to the Governor
Office of the Governor
P.O. Box 83720
Boise, Idaho 83720-0034
Telephone: (208) 334-2100
Facsimile: (208) 334-3454

Attorney for Governor Otter

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

WENDY KNOX, and RICHARD DOTSON, Plaintiffs, v. STATE OF IDAHO, ex rel. C. L. OTTER, Governor; BEN YSURSA, Secretary of State; and LAWRENCE WASDEN, Attorney General, Defendants.	*Case No. CV-2008-667* AFFIDAVIT OF CLAY R. SMITH

I, CLAY R. SMITH, being of lawful age and first duly sworn, state as follows:

1. I am employed as a Deputy Attorney General for the State of Idaho. I am assigned to the Natural Resources Division of the Attorney General's Office and represent the defendants in this matter.

2. Attached as Exhibits 1 through 5 are documents referred to in the Brief in Support of Defendants' Motion to Dismiss filed simultaneously with this affidavit. Each exhibit has been taken from judicial records, is a true and accurate copy of the document that it purports to be, and contains facts subject to judicial notice under Idaho R. Evid. 201(b).

a. Exhibit 1: Affidavit of Miren E. Artiach dated February 18, 2004 (filed on February 20, 2004 in *Shoshone-Bannock Tribes v. State of Idaho et al.*, Nos. CIV 01-52-E-BLW & CIV 01-171-E-BLW (D. Idaho)).

b. Exhibit 2: Order dated June 2, 2003 (filed *In re Matter of the Petition/Action to Determine the Constitutionality Idaho Code Sections 67-429B and 67-429C, Enacted in the Indian Gaming Initiative, Proposition One*, No. 29226 (Idaho S. Ct.)).

c. Exhibit 3: Order dated October 16, 2003 (filed in *In re Matter of the Petition/Action to Determine the Constitutionality Idaho Code Sections 67-429B and 67-429C, Enacted in the Indian Gaming Initiative, Proposition One*, No. 29226 (Idaho S. Ct.)).

d. Exhibit 4: The Shoshone-Bannock Tribes and the State of Idaho Compact for Class III Gaming dated February 18, 2000 (filed on January 31, 2001 in *Shoshone-Bannock Tribes v. State of Idaho et al.*, Nos. CIV 01-52-E-BLW & CIV 01-171-E-BLW (D. Idaho)).

e. Exhibit 5: Memorandum Decision and Order dated April 9, 2004 (filed on April 12, 2004 in *Shoshone-Bannock Tribes v. State of Idaho et al.*, Nos. CIV 01-52-E-BLW & CIV 01-171-E-BLW (D. Idaho)).

This concludes my affidavit.

DATED this 23rd day of April 2008.

By: _____
CLAY R. SMITH
Deputy Attorney General
Natural Resources Division

SUBSCRIBED AND SWORN before me this 23rd day of April, 2008.

PATRICIA BOEHM NOTARY PUBLIC STATE OF IDAHO

_____
Notary Public of Idaho
My commission expires 11/6/09.

CERTIFICATE OF SERVICE

I certify that on the 24th day of April, 2008 I caused to be served a true and correct copy of the foregoing upon the following party by the method listed below:

CURT R. THOMSEN, ESQ. T. JASON WOOD, ESQ. THOMSEN STEPHENS LAW OFFICES, PLLC 2635 CHANNING WAY IDAHO FALLS ID 83404	X U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Federal Express ☐ Facsimile: 208-522-1277 ☐ Statehouse Mail

CLAY R. SMITH

EXHIBIT 1

AFFIDAVIT OF MIREN E. ARTIACH DATED FEBRUARY 18, 2004 (filed on February 20, 2004 in *Shoshone-Bannock Tribes v. State of Idaho et al.*, Nos. CIV 01-52-E-BLW & CIV 01-171-E-BLW (D. Idaho))

LAWRENCE G. WASDEN
ATTORNEY GENERAL

DAVID G. HIGH (ISB NO. 1820)
MICHAEL S. GILMORE (ISB NO. 1625)
JEREMY C. CHOU (ISB NO. 5680)
Deputy Attorneys General
Statehouse, Room 210
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Lottery\Sho-Ban\p4049ca.doc
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

SHOSHONE-BANNOCK TRIBES, a federally recognized tribe Plaintiff, vs. STATE OF IDAHO and IDAHO STATE LOTTERY, Defendants.	Consolidated Case Nos. CIV 01-521-E-BLW CIV 01-171-E-BLW **AFFIDAVIT OF MIREN E. ARTIACH**
STATE OF IDAHO and IDAHO STATE LOTTERY, Plaintiffs, vs. SHOSHONE-BANNOCK TRIBES; and the FORT HALL BUSINESS COUNCIL; and the SHOSHONE-BANNOCK TRIBAL GAMING COMMISSION, Defendants.	

STATE OF IDAHO)
) ss.
County of Ada)

I, Miren E. Artiach, being first duly sworn, depose and say:

1. I am employed as a Deputy Secretary of State for the Idaho Secretary of State's Office.

2. Pursuant to Idaho Code § 67-429C(2), any tribe in the State of Idaho which wishes to amend its existing state-tribal gaming compact must deliver to the Secretary of State a tribal resolution signifying the tribe's acceptance of the terms of the amendment. I am the custodian of those records submitted to the Secretary of State's Office under Idaho Code § 67-429C(2).

3. Attached hereto are true and correct copies of the following records in the Secretary of State's Office:

a. Exhibit 1: November 6, 2002, letter from Ernest L. Stensgar, Chairman, Coeur d'Alene Tribe, to Idaho Secretary of State with enclosed Coeur d'Alene Tribe Resolution 37-03 and Amendment to 1992 Class III Gaming Compact By and Between the Coeur d'Alene Tribe and the State of Idaho.

b. Exhibit 2: November 6, 2002, letter from Gary Aitken, Sr., Chairman, Kootenai Tribe of Idaho, to Idaho Secretary of State with enclosed Kootenai Tribe Resolution 03-03 and Amendment to 1993 Class III Gaming Compact By and Between the Kootenai Tribe of Idaho and the State of Idaho.

c. Exhibit 3: November 6, 2002, letter from Samuel N. Penney, Chairman, Nez Perce Tribal Executive Committee, to Idaho Secretary of State with enclosed Nez Perce Tribe Resolution 95-595 Amended and Addendum to 1995 Class III Gaming Compact By and Between the Nez Perce Tribe and the State of Idaho.

///

///

This concludes my affidavit.

Miren E. Artiach

Miren E. Artiach

SUBSCRIBED AND SWORN TO before me this 18th day of February, 2004.

MARILYN A. JOHNSON NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
My Commission Expires: 12/15/2006

REFERENCE:

COEUR D'ALENE TRIBE

850 A STREET
P.O. BOX 408
PLUMMER, IDAHO 83851
(208) 686-1800 • Fax (208) 686-1182

November 6, 2002

Idaho Secretary of State
Statehouse, Room 203
Boise, Idaho 83720-0080

RE: Coeur d'Alene Tribe's Amendment to 1992 Class III Gaming Compact Pursuant to Proposition One

Dear Secretary of State:

Enclosed herewith is a copy of Coeur d'Alene Tribe Resolution 37-03 and an Amendment to the current 1992 Class III Gaming Compact By and Between the Coeur d'Alene Tribe and the State of Idaho, amending the above-referenced gaming compact in accordance with the terms as set forth in Section 4 of Proposition One, codified as Idaho Code § 67-429C, by the addition to the compact of a new section – Article 6.8.

The compact amendment is deemed effective upon the authorized signature by the Coeur d'Alene Tribe which is affixed to the Amendment and Resolution enclosed. Pursuant to Idaho Code 67-429C(2) this compact amendment adding a new section Article 6.8 is deemed effective immediately upon delivery of the enclosed resolution to the Secretary of State.

With this delivery, the terms and conditions of Idaho Code 67-429C are hereby met and the Tribe's current Class III Gaming Compact is deemed immediately amended by the addition of new section Article 6.8 and is deemed immediately approved by the State of Idaho pursuant to Idaho Code 67-429A. There is no need for any further signature or action by the executive or the legislative branches of state government to effectuate this amendment.

Sincerely,

Ernest L. Stensgar
Chairman

Enclosures

6.8.3 Not withstanding any other provision of this compact, and to the extent such contributions are not already required under the tribe's existing compact, the tribe agrees to contribute 5% of its annual net gaming income for the support of local educational programs and schools on or near the reservation. The tribe may elect to contribute additional sums for these or other educational purposes. Disbursements of these funds shall be at the sole direction of the tribe.

6.8.4 Nothwithstanding any other provision of this compact, the tribe agrees not to conduct gaming outside of Indian lands;

PROVIDED THAT, Proposition One, having been passed by a majority of the voters of the State of Idaho is not hereinafter substantially amended or repealed; and

BE IT FURTHER RESOLVED, that this Compact Amendment is deemed effective upon the signature by the Coeur d'Alene Tribe on November 6, 2002, and approval by the Secretary of the Interior or her designated representative if necessary, as pursuant to Idaho Code 67-429C(2). There is no need for further signature or action by the executive or the legislative branches of state government to effectuate this Amendment.

CERTIFICATION

The foregoing resolution was adopted at a meeting of the Coeur d'Alene Tribal Council held at Tribal Administration Building, 850 A Street, Plummer, Idaho on October 31, 2002, with the required quorum present by a vote of **6 FOR 0 AGAINST 0 ABSTAIN.**

ERNEST L. STENSGAR, CHAIRMAN
COEUR D'ALENE TRIBAL COUNCIL

NORMA JEAN LOUIE, SECRETARY
COEUR D'ALENE TRIBAL COUNCIL

AMENDMENT

The 1992 Class III Gaming Compact By and Between the Coeur d'Alene Tribe and the State of Idaho has been approved for amendment by Idaho ballot measure Proposition One, the Indian Gaming and Self-Reliance Act, which received a majority of the votes in the November 5, 2002 Idaho state election. Proposition One is the law of the state of Idaho, and as set forth in Section 4 of Proposition One and as codified at Idaho Code § 67-429C, the 1992 Class III Gaming Compact By and Between the Coeur d'Alene Tribe and the State of Idaho is hereby amended by the addition of a new Article 6.8 as follows:

Article 6.8 Gaming Machines Permitted; Expansion Limitation; Education Funding

6.8.1 Notwithstanding any other provision of this compact, the tribe is permitted to conduct gaming using tribal video gaming machines as described in Section 67-429B, Idaho Code.

6.8.2 Notwithstanding any other provision of this compact, in the 10 years following incorporation of this term into its compact, the number of tribal video gaming machines the tribe may possess is limited to the number of tribal video gaming machines possessed by the tribe as of January 1, 2002, plus 25% of that number; provided, however, that no increase in any single year shall exceed 5% of the number possessed as of January 1, 2002. Thereafter, the tribe may operate such additional tribal video gaming machines as are agreed to pursuant to good faith negotiations between the state and the tribe under a prudent business standard.

6.8.3 Notwithstanding any other provision of this compact, and to the extent such contributions are not already required under the tribe's existing compact, the tribe agrees to contribute 5% of its annual net gaming income for the support of local educational programs and schools on or near the reservation. The tribe may elect to contribute additional sums for these or other educational purposes. Disbursements of these funds shall be at the sole direction of the tribe.

6.8.4 Notwithstanding any other provision of this compact, the tribe agrees not to conduct gaming outside of Indian lands;

This Amendment is deemed effective upon the signature by the Coeur d'Alene Tribe, and approval by the Secretary of the Interior or her designated representative. Pursuant to Idaho Code 67-429C(2) there is no need for further signature or action by the executive or the legislative branches of state government to effectuate this Amendment.

Coeur d'Alene Tribe

Ernest L. Stensgar

Ernest L. Stensgar
Dated this 6th day of November, 2002.

KOOTENAI TRIBE OF IDAHO
P.O. Box 1269 Bonners Ferry, Idaho 83805
(208) 267-3519 Fax. No. (208) 267-2960

November 6, 2002

Secretary of State
Statehouse, Room 203
Boise, Idaho 83720-0080

RE: Kootenai Tribe of Idaho's Amendment to 1993 Class III Gaming Compact Pursuant to Proposition One

Dear Mr. Secretary:

Here is a copy of the Kootenai Tribe of Idaho's Resolution 03-03 adding an Amendment to its 1993 Class III Gaming Compact with the State of Idaho. The amendment adds a new section, Article 6.8, to the compact in accordance with the terms of Section 4 of the recently passed Proposition One.

Sincerely,

Gary Aitken Sr.

Gary Aitken, Sr.
Chairman

Enclosures

02 MAY -5 AM 8:03
SECRETARY OF STATE
STATE OF IDAHO

R E S O L U T I O N

KOOTENAI 03-03

WHEREAS, the Kootenai Tribal Council has been empowered to act for and on behalf of the Kootenai Tribe of Idaho pursuant to the Constitution and Bylaws ratified by the adult members of the Kootenai Tribe of Idaho on April 10, 1947 and approved/signed by the acting commissioner of Indian Affairs on June 16, 1947; and

WHEREAS, the Kootenai Tribe of Idaho has participated in tribal efforts to develop and promote Proposition One, the Indian Gaming and Self-Reliance Initiative for inclusion on the November 5, 2002 Idaho general election ballot to clarify Idaho law regarding tribal gaming; and

WHEREAS, Proposition One received a majority of the affirmative votes in the November 5, 2002 Idaho state election;

WHEREAS, Proposition One amends existing Idaho Code to confirm the right of tribes to use tribal video gaming machines as defined in Idaho Code 67-429B and authorizes the Tribe to amend its 1993 Class III Gaming Compact By and Between the Kootenai Tribe and the State of Idaho pursuant to the terms of the initiative by tribal resolution submitted to the Idaho Secretary of State;

NOW, THEREFORE BE IT RESOLVED, that the Kootenai Tribe of Idaho hereby amends its 1993 Class III Gaming Compact pursuant to the terms set forth in Section 4 of Proposition One, codified as Idaho Code § 67-429C, which shall thereafter become effective by operation of law, by adding to the compact a new section Article 6.8 as follows:

Article 6.8 Tribal Video Gaming Machines; Expansion Limitation; Education Funding

.1 Not withstanding any other provision of this compact and as clarified by this compact amendment, the tribe is permitted to conduct gaming using tribal video gaming machines as described in Section 67-429B, Idaho Code.

.2 Not withstanding any other provision of this compact, in the 10 years following incorporation of this term into its compact, the number of tribal video gaming machines the tribe may possess is limited to the number of tribal video gaming machines possessed by the tribe as of January 1, 2002, plus 25% of that number; provided, however, that no increase in any single year shall exceed 5% of the number possessed as of January 1, 2002. Thereafter, the tribe may operate such additional tribal video gaming machines as are agreed to pursuant to good faith negotiations between the state and the tribe under a prudent business standard.

.3 Not withstanding any other provision of this compact, to the extent such contributions are not already required under the tribe's existing compact, the tribe agrees to contribute 5% of its annual net gaming income for the support of local educational programs and schools on or near the reservation. The tribe may elect to contribute additional sums for these or other educational purposes. Disbursements of these funds shall be at the sole discretion of the tribe.

.4 Not withstanding any other provision of this compact, the tribe agrees not to conduct gaming outside of Indian lands.;

CERTIFICATION

The foregoing resolution was duly adopted at a Tribal Council meeting duly called, constituted and held at the Kootenai Tribal Complex, near Bonners Ferry, Idaho on the 31st day of October, 2002; with the required quorum present by a vote of 5 for and 0 against, and 0 abstention.

Gary Aitken Sr.
Gary Aitken Sr., Chairperson
Kootenai Tribal Council

ATTEST:

Bernadine Boy Chief
Bernadine Boy Chief
Secretary, Tribal Council

AMENDMENT

The Class III Gaming Compact By and Between the Kootenai Tribe of Idaho and the State of Idaho, dated September 23, 1993 and approved pursuant to federal law by the appointed representative of the Assistant Secretary, Indian Affairs, Department of the Interior, on October 29, 1993, is hereby amended. Idaho ballot measure Proposition One, the Indian Gaming and Self-Reliance Act, which having received a majority of the votes in the November 5, 2002 Idaho state election is the law of the state of Idaho. The terms set forth in Section 4 of Proposition One are now codified at Idaho Code § 67-429C and create a new section, Article 6.8, which is hereby added to the Compact and states as follows:

Article 6.8 Tribal Video Gaming Machines; Expansion Limitation; Education Funding

.1 Notwithstanding any other provision of this compact and as clarified by this compact amendment, the tribe is permitted to conduct gaming using tribal video gaming machines as described in Section 67-429B, Idaho Code.

.2 Not withstanding any other provision of this compact, in the 10 years following incorporation of this term into its compact, the number of tribal video gaming machines the tribe may possess is limited to the number of tribal video gaming machines possessed by the tribe as of January 1, 2002, plus 25% of that number; provided, however, that no increase in any single year shall exceed 5% of the number possessed as of January 1, 2002. Thereafter, the tribe may operate such additional tribal video gaming machines as are agreed to pursuant to good faith negotiations between the state and the tribe under a prudent business standard.

.3 Not withstanding any other provision of this compact, to the extent such contributions are not already required under the tribe's existing compact, the tribe agrees to contribute 5% of its annual net gaming income for the support of local educational programs and schools on or near the reservation. The tribe may elect to contribute additional sums for these or other educational purposes. Disbursements of these funds shall be at the sole direction of the tribe.

.4 Not withstanding any other provision of this compact, the tribe agrees not to conduct gaming outside of Indian lands.

This Amendment is effective upon the approval by the Secretary of the Interior or her designated representative. Pursuant to Idaho Code 67-429C(2) there is no need for further signature or action by the executive or the legislative branches of state government to effectuate this Amendment.

KOOTENAI TRIBE OF IDAHO

Gary Aitken Sr.

Gary Aitken, Sr., Chairman
Dated this 6th day of November 2002.

Nez Perce

TRIBAL EXECUTIVE COMMITTEE
P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

November 6, 2002

Idaho Secretary of State
Statehouse, Room 203
Boise, Idaho 83720-0080

RE: Nez Perce Tribe's Amendment to 1995 Class III Gaming Compact Pursuant to Proposition One

Dear Secretary of State:

Enclosed herewith is a copy of Nez Perce Tribe Resolution 95-595 Amended and an Addendum to the current 1995 Class III Gaming Compact By and Between the Nez Perce Tribe and the State of Idaho adding a new section to the above referenced gaming compact in accordance with the terms as set forth in Section 4 of Proposition One codified as Idaho Code § 67-429C, by the addition to the compact of a new section – Article 6.4.

The compact addendum is deemed effective upon the authorized signature by the Nez Perce Tribe which is affixed to the Addendum and Resolution enclosed. Pursuant to Idaho Code 67-429C(2) this compact amendment adding a new section Article 6.4 is deemed effective immediately upon delivery of the enclosed resolution to the Secretary of State.

With this delivery, the terms and conditions of Idaho Code 67-429C are hereby met and the Tribe's current Class III Gaming Compact is deemed immediately amended by the addition of new section Article 6.4 and is deemed immediately approved by the State of Idaho pursuant to Idaho Code 67-429A. There is no need for any further signature or action by the executive or the legislative branches of state government to effectuate this amendment.

Sincerely,

Samuel N. Penney

Samuel N. Penney
Chairman

Enclosures

02 NOV -6 AM 8:48
SECRETARY OF STATE
STATE OF IDAHO

NP 95-595
Amended

RESOLUTION

WHEREAS, the Nez Perce Tribal Executive Committee has been empowered to act for and on behalf of the Nez Perce Tribe pursuant to the Revised Constitution and By-Laws, adopted by the General Council of the Nez Perce Tribe, on May 6, 1961 and approved by the Acting Commissioner of Indian Affairs on June 27, 1961; and

WHEREAS, Proposition One, the Indian Gaming and Self-Reliance, has received a majority of the affirmative votes in the November 5, 2002 Idaho state election; and

WHEREAS, Proposition One automatically amends existing Idaho Code to authorize the use of tribal video gaming machines as defined in Idaho Code 67-429B and authorizes the Nez Perce Tribe to amend its current 1995 Class III Gaming Compact By and Between the Nez Perce Tribe and the State of Idaho by Tribal Resolution submitted to the Idaho Secretary of State;

NOW, THEREFORE BE IT RESOLVED, that the Nez Perce Tribal Executive Committee (NPTEC) hereby amends its 1995 Class III Gaming Compact pursuant to the terms as set forth in Section 4 of Proposition One codified as Idaho Code § 67-429C, by the addition to the compact of the new section Article 6.4 as follows:

Article 6.4 Tribal Video Gaming Machines; Expansion Limitation; Education Funding

.1 Not withstanding any other provision of this compact and as clarified by this compact amendment, the tribe is permitted to conduct gaming using tribal video gaming machines as described in Section 67-429B, Idaho Code.

.2 Not withstanding any other provision of this compact, in the 10 years following incorporation of this term into its compact, the number of tribal video gaming machines the tribe may possess is limited to the number of tribal video gaming machines possessed by the tribe as of January 1, 2002, plus 25% of that number; provided, however, that no increase in any single year shall exceed 5% of the number possessed as of January 1, 2002. Thereafter, the tribe may operate such additional tribal video gaming machines as are agreed to pursuant to good faith negotiations between the state and the tribe under a prudent business standard.

.3 Not withstanding any other provision of this compact, to the extent such contributions are not already required under the tribe's existing compact, the tribe agrees to contribute 5% of its annual net gaming income for the support of local educational programs and schools on or near the reservation. The tribe may elect to contribute additional sums for these or other educational purposes. Disbursements of these funds shall be at the sole direction of the tribe.

.4 Not withstanding any other provision of this compact, the tribe agrees not to conduct gaming outside of Indian lands.;

PROVIDED THAT, Proposition One, having been passed by a majority of the voters of the State of Idaho is not hereinafter substantially amended or repealed; and

BE IT FURTHER RESOLVED, that this Compact Amendment is deemed effective upon the signature by the Nez Perce Tribe on November 6, 2002, and approval by the Secretary of the Interior or her designated representative if necessary, as pursuant to Idaho Code 67-429C(2) there is no need for further signature or action by the executive or the legislative branches of state government to effectuate this Amendment.

CERTIFICATION

The foregoing resolution was duly adopted by the Nez Perce Tribal Executive Committee meeting in Special Session, October 22, 2002, at the Richard A. Halfmoon Council Chambers, Lapwai, Idaho, a quorum of its members being present and voting.

BY: _____
for Julia A. Davis-Wheeler, Secretary

ATTEST:

_____
Samuel N. Penney, Chairman

ADDENDUM

The 1995 Class III Gaming Compact By and Between the Nez Perce Tribe and the State of Idaho, on August 22, 1995, and approved by Ada E. Deer, Assistant Secretary of Indian Affairs, Department of the Interior, on October 20, 1995, and amended on December 12, 1998, is hereby amended by Idaho ballot measure Proposition One, the Indian Gaming and Self-Reliance Act, which having received a majority of the votes in the November 5, 2002 Idaho state election is the law of the state of Idaho, as set forth in Section 4 of Proposition One as codified at Idaho Code § 67-429C, by the addition of a new compact section Article 6.4 as follows:

Article 6.4 **Tribal Video Gaming Machines; Expansion Limitation; Education Funding**

.1 Not withstanding any other provision of this compact and as clarified by this compact amendment, the tribe is permitted to conduct gaming using tribal video gaming machines as described in Section 67-429B, Idaho Code.

.2 Not withstanding any other provision of this compact, in the 10 years following incorporation of this term into its compact, the number of tribal video gaming machines the tribe may possess is limited to the number of tribal video gaming machines possessed by the tribe as of January 1, 2002, plus 25% of that number; provided, however, that no increase in any single year shall exceed 5% of the number possessed as of January 1, 2002. Thereafter, the tribe may operate such additional tribal video gaming machines as are agreed to pursuant to good faith negotiations between the state and the tribe under a prudent business standard.

.3 Not withstanding any other provision of this compact, to the extent such contributions are not already required under the tribe's existing compact, the tribe agrees to contribute 5% of its annual net gaming income for the support of local educational programs and schools on or near the reservation. The tribe may elect to contribute additional sums for these or other educational purposes. Disbursements of these funds shall be at the sole direction of the tribe.

.4 Not withstanding any other provision of this compact, the tribe agrees not to conduct gaming outside of Indian lands.

This Amendment is deemed effective upon the signature by the Nez Perce Tribe, and approval by the Secretary of the Interior or her designated representative. Pursuant to Idaho Code 67-429C(2) there is no need for further signature or action by the executive or the legislative branches of state government to effectuate this Amendment.

NEZ PERCE TRIBE

Samuel N. Penney

Samuel N. Penney, Chairman
Dated this 6th day of November, 2002.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of February, 2004, I caused to be served a true and correct copy of the foregoing by the following method to:

Brandelle Whitworth
Office of Reservation Attorney
Shoshone-Bannock Tribes
PO Box 306
Fort Hall, ID 83203

☒ U.S. Mail
☐ Hand Delivery
☐ Certified Mail, Return Receipt Requested
☐ Overnight Mail
☒ Facsimile: (208) 239-9276

Scott D. Crowell
Crowell Law Offices
1670 10th Street West
Kirkland, WA 98033

☒ U.S. Mail
☐ Hand Delivery
☐ Certified Mail, Return Receipt Requested
☐ Overnight Mail
☒ Facsimile: (425) 828 9978

Conly J. Schulte
Montcau, Peebles and Crowell
12100 West Center Road, Suite 202
Omaha, NE 68144-3960

☒ U.S. Mail
☐ Hand Delivery
☐ Certified Mail, Return Receipt Requested
☐ Overnight Mail
☒ Facsimile: (402) 333-4761

Michael S. Gilmore

EXHIBIT 2

ORDER DATED JUNE 2, 2003
(filed *In re Matter of the Petition/Action to Determine the Constitutionality Idaho Code Sections 67-429B and 67-429C, Enacted in the Indian Gaming Initiative, Proposition One*, No. 29226 (Idaho S. Ct.))

In the Supreme Court of the State of Idaho

IN THE MATTER OF THE PETITION/ ACTION TO DETERMINE THE CONSTITUTIONALITY OF IDAHO CODE SECTIONS 67-429B AND 67-429C, ENACTED IN THE INDIAN GAMING INITIATIVE, PROPOSITION ONE.	)
MAXINE T. BELL; LAIRD NOH; PAUL CHRISTENSEN; and BRYAN FISCHER, Petitioners, v. PETE T. CENARRUSA, in his capacity as Idaho Secretary of State, DIRK KEMPTHORNE, in his capacity as Idaho Governor, ERNEST L. STENSGAR, and THE COALITION FOR INDIAN SELF RELIANCE, real parties in interest, Respondents.	ORDER NO. 29226 Ref. No. 02S-385

The Petitioners have filed a petition/action asking this Court to exercise original jurisdiction or inherent jurisdiction to determine the constitutionality of Idaho Code §§ 67-429B and 67-429C. The Petitioners assert several grounds upon which they contend that this Court has original jurisdiction to hear their petition.

First, they contend that this Court has original jurisdiction based upon that portion of Idaho Code § 34-1809 that provides: "Any qualified elector of the state of Idaho may, at any time after the attorney general has issued a certificate of review, bring an action in the Supreme Court to determine the constitutionality of any initiative." This Court's original jurisdiction is set forth in the Constitution. The legislature has no power to extend this Court's original jurisdiction. *Neil v. Public Utilities Comm'n*, 32 Idaho 44, 178 P. 271 (1919). The Petitioners contend, however, that pursuant to Article III, § 1, of the Idaho Constitution, the legislature has the power to grant this Court original jurisdiction to determine the constitutionality of initiatives.

The portion of Article III, § 1, upon which the Petitioners rely states that "legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection." They contend that this provision authorizes the legislature to grant original jurisdiction to this court in matters regarding initiatives. There is absolutely nothing in the wording of this provision that could reasonably be so construed. It merely authorizes the legislature to determine the conditions and manner in which the voters may exercise the power to propose laws by the initiative process.

The Petitioners next contend that this Court has original jurisdiction to hear their petition pursuant to that portion of Article V, § 9, of the Idaho Constitution, which provides: "The Supreme Court shall also have original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction." They argue that by their petition they are requesting a writ of prohibition.

A writ of prohibition "arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." IDAHO CODE § 7-401 (1998). The Petitioners seek a declaration that Idaho Code §§ 67-429B and 67-429C are unconstitutional. They are not seeking to arrest the proceedings of any tribunal, corporation, board or person.

The Petitioners next contend that this Court has original jurisdiction under the Uniform Declaratory Judgment Act. This Court has jurisdiction to grant a summary judgment only in connection with the proper exercise of its original jurisdiction as granted by the Constitution. *See Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410 (1990). We do not have original jurisdiction to hear actions seeking a declaratory judgment that are unconnected with our jurisdiction under Article V, § 9, "to issue writs of mandamus, certiorari, prohibition, and habeas corpus."

Finally, Petitioners contend that this Court has original jurisdiction to hear this declaratory judgment action pursuant to Article V, § 2, of the Idaho Constitution, which provides: "The judicial power of the state shall be vested in a court for the trial of impeachments, a Supreme Court, district courts, and such other courts inferior to the Supreme Court as established by the legislature." It is §§ 9 and 10 of Article V, however, which define

this Court's original jurisdiction. *Dewey v. Schreiber Implement Co.*, 12 Idaho 280, 85 P. 921 (1906). Indeed, if § 2 were construed to provide that this Court has original jurisdiction in all cases, then §§ 9 and 10 would be superfluous. Under neither section do we have original jurisdiction to hear the Petitioners' petition/action. Therefore, after due consideration,

IT IS HEREBY ORDERED that the petition/action to determine the constitutionality of Idaho Code §§ 67-429B and 67-429C, enacted in the Indian Gaming Initiative, Proposition One, be, and hereby is, DISMISSED without prejudice because this Court does not have original jurisdiction to decide the matter.

DATED this 2nd day of June 2003.

By Order of the Supreme Court

Linda Copple Trout, Chief Justice

ATTEST:

Frederick C. Lyon, Clerk

cc: Counsel of Record

I, Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order entered in the above entitled cause and now on record in my office.
WITNESS my hand and the Seal of this Court 4/11/08

STEPHEN W. KENYON Clerk

By: Kimber Greene Deputy

EXHIBIT 3

ORDER DATED OCTOBER 16, 2003
(filed in *In re Matter of the Petition/Action to Determine the Constitutionality Idaho Code Sections 67-429B and 67-429C, Enacted in the Indian Gaming Initiative, Proposition One*, No. 29226 (Idaho S. Ct.))

In the Supreme Court of the State of Idaho

IN THE MATTER OF THE PETITION/ ACTION TO DETERMINE THE CONSTITUTIONALITY OF IDAHO CODE SECTIONS 67-429B AND 67-429C, ENACTED IN THE INDIAN GAMING INITIATIVE, *PROPOSITION ONE.*

MAXINE T. BELL; et al.,

Petitioners,

v.

PETE T. CENARRUSA, in his capacity as Idaho Secretary of State, et al.,

Respondents,

and

BRUCE NEWCOMB and ROBERT L. GEDDES,

Intervenors.

ORDER DENYING PETITION FOR REHEARING

NO. 29226
Ref. No. 03RH-25

I, Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the Order entered in the above entitled cause and now on record in my office,
WITNESS my hand and the Seal of this Court 4/11/08

STEPHEN W. KENYON Clerk

By: Kimber Jane Deputy

On June 2, 2003 the Court issued an ORDER dismissing the PETITION/ACTION TO DETERMINE THE CONSTITUTIONALITY OF IDAHO CODE SECTIONS 67-429B AND 67-429C, ENACTED IN THE INDIAN GAMING INITIATIVE, PROPOSITION ONE without prejudice because this Court does not have original jurisdiction to decide the matter. The Petitioners filed a PETITION FOR REHEARING and supporting BRIEF on June 19, 2003 and the Intervenors filed a BRIEF IN SUPPORT OF PETITION FOR REHEARING August 15, 2003. The Court is fully advised; therefore, after due consideration,

IT IS HEREBY ORDERED that Petitioner's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 16th day of October 2003.

By Order of the Supreme Court

Frederick C. Lyon, Clerk

cc: Counsel of Record

072

Entered on ATS
By:

EXHIBIT 4

SHOSHONE-BANNOCK TRIBES AND THE STATE OF IDAHO COMPACT FOR CLASS III GAMING DATED FEBRUARY 18, 2000
(filed on January 31, 2001 in *Shoshone-Bannock Tribes v. State of Idaho et al.*, Nos. CIV 01-52-E-BLW & CIV 01-171-E-BLW (D. Idaho))

THE SHOSHONE-BANNOCK TRIBES
and the
STATE OF IDAHO
COMPACT FOR CLASS III GAMING

THIS TRIBAL-STATE COMPACT made and entered into by and between the Shoshone-Bannock Tribes (hereinafter the "Tribes"), a federally recognized Indian Tribe, and the State of Idaho (hereinafter the "State") pursuant to the provisions of the Indian Gaming Regulatory Act (hereinafter the "Act"), Pub. L. 100-497, 25 U.S.C. §§ 2701, *et seq.*, and 18 U.S.C. §§ 1166-1168.

1. **Title**

This document shall be referred to as "The Shoshone-Bannock Tribes and the State of Idaho Compact for Class III Gaming."

2. **Definitions**

For purposes of this Compact:

a. "Act" means the Indian Gaming Regulatory Act, Pub. L. 100-497, 25 U.S.C. §§ 2701, *et seq.*, and 18 U.S.C. §§ 1166-1168.

b. "Business Council" means the Fort Hall Business Council, which is the elected governing body of the Shoshone-Bannock Tribes.

c. "Class III gaming" means all forms of gaming set forth in Sections 4 and 5 of this Compact that are not Class I or Class II as defined in Sections 4(6) and 4(7) of the Act, 25 U.S.C. §§ 2703(6) and (7).

d. "Compact" means the Shoshone-Bannock Tribes and the State of Idaho Compact for Class III Gaming.

e. "Distributor" means a person who distributes any machines or devices of any kind used for any gaming activity in the gaming facility.

Exhibit A

f. "Finding of suitability" means an approval granted to a person or enterprise directly or indirectly involved with the gaming operation and relates only to the specified involvement for which it was made. If the nature of the involvement changes from that for which the applicant is found suitable, the Tribal Gaming Agency may require the person or enterprise to submit for a determination of suitability in the new capacity.

g. "Gaming employee" means any person employed in the operation or management of the gaming operation, whether employed by the Tribes or by any enterprise providing onsite services to the Tribes within the gaming facility.

h. "Gaming facility" or "gaming facilities" means the land together with all buildings, improvements and facilities used or maintained in connection with the conduct of Class III gaming on Indian Lands as provided by this Compact.

i. "Gaming operation" means the Tribes' operation of Class III gaming in any gaming facility.

j. "Indian Lands" means those lands within the Tribes' jurisdictional limits that meet the definition of "Indian lands" as defined in the Indian Gaming Regulatory Act.

k. "License" means an approval or certification issued by the Tribal Gaming Commission to any person or entity involved in the gaming operation or in the providing of gaming services to the gaming operation.

l. "Licensee" means any person or entity who has been approved, licensed, certified or found suitable by the Tribal Gaming Commission to be involved in the gaming operation or in the providing of gaming services in the gaming operation.

m. "Net gaming revenue" means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.

n. "NIGC" means the National Indian Gaming Commission established pursuant to 25 U.S.C. §§ 2704.

o. "Ordinance" means the ordinance adopted by the Tribes and approved by the NIGC.

p. "State" means the State of Idaho, its authorized officials, agents and representatives.

q. "State Gaming Agency" means the Idaho agency designated by the State by written notice to the Tribes as the single state agency primarily responsible for fulfilling the obligations of this Compact.

r. "Tribal Gaming Commission" means the agency of the Tribes primarily responsible for regulatory oversight of Class III gaming.

s. "Tribal law enforcement agency" means the police force of the Tribes, established and maintained by the Tribes, pursuant to the Tribes' powers of self-government, to carry out law enforcement on Indian Lands.

t. "Tribes" or "Tribal" means of or stemming from the Shoshone-Bannock Tribes, its authorized officials, agents and representatives acting on the Tribes' behalf pursuant to Tribal law.

3. Recitals

a. WHEREAS, the Tribes and the State recognize and respect the laws and authority of the respective parties; and

b. WHEREAS, it is the intent of the Tribes and the State that the provisions of this Compact, including but not limited to the resolution process outlined herein, apply to and control only the issues arising from the terms and provisions of this Compact.

b. WHEREAS, the Congress of the United States has enacted into law the Act, Pub. L. 100-497, 25 U.S.C. §§ 2701, *et seq.*, and 18 U.S.C. §§ 1166-1168, which provides in part that a tribal state compact may be negotiated between a tribe and a state to govern the conduct of certain Class III gaming activities on Indian Lands of tribes within the state; and

c. WHEREAS, the Tribes and the State have negotiated the terms and conditions of this Compact in good faith so as to provide for mutual governmental purposes and to provide a regulatory framework for the operation of certain Class III gaming, which is intended to: (a) ensure the fair and honest operation of such gaming activities; (b) maintain the integrity of all activities conducted in regard to such gaming activities; (c) prevent unsavory and unsuitable persons from having any direct or indirect involvement with gaming activities at any time or in any capacity; (d) establish and maintain responsible accounting practices and procedures; (e) maintain effective control over the financial practices related to gaming activities, including establishing the minimum procedures for internal fiscal affairs and the safeguarding of assets and revenues and reliable recordkeeping; (f) prevent cheating and fraudulent practices; and (g) protect the health, welfare and safety of the citizens of the Tribes and of the State; and

d. WHEREAS, the Act provides that an Indian tribe may conduct Class III gaming as provided in IGRA; and

e. WHEREAS, the Shoshone-Bannock Tribes and the State of Idaho have mutually agreed that the conduct of Class III gaming under the terms and conditions set forth below will benefit the Tribes and protect the citizens of the Tribes and of the State consistent with the objectives of the Act; and

f. WHEREAS, the parties hereto deem it to be in their respective best interests to enter into this Compact; and

g. WHEREAS, a principal goal of federal Indian policy is to promote tribal economic development, tribal self-determination and a strong government to government relationship; and

h. WHEREAS, the State recognizes the Tribes' sovereign rights to control gaming activities on Indian Lands as provided by the Act and this Compact; and

i. WHEREAS, it is the policy of the Tribes to exercise and retain its rights to regulate gaming activities upon its lands and reservation for the purposes of encouraging

Tribal employment, economic and social development, and funding of Tribal services while ensuring the fair and lawful operation of gaming and the prevention of corrupt and criminal influences. The Tribes will utilize net revenues generated by gaming to fund programs that provide important governmental services to Tribal members and reservation residents. These programs include education, health and human resources, housing development, road construction and maintenance, sewer and water projects, police, fire, judicial services, economic development, and any other purpose authorized under the Act; and

j. WHEREAS, it is a goal of this Compact that positive economic effects of such gaming will extend beyond Indian Lands to the Tribes' neighbors and surrounding communities and help to foster mutual respect and understanding among Indians and non-Indians; and

k. WHEREAS, this Compact shall govern the licensing, regulation and operation of Class III gaming conducted by the Tribes on Indian Lands located within the State; and

l. WHEREAS, the State and the Tribes are empowered to enter into this Compact due to their inherent power to contract and pursuant to the Indian Gaming Regulatory Act; and

m. WHEREAS, it is also understood that prior to becoming effective the State shall obtain legislative authorization to waive its immunity as provided under the Eleventh Amendment of the United States Constitution and the Tribes shall obtain authorization to waive their sovereign immunity. The signatories will certify that this authorization has been obtained; and

n. WHEREAS, the parties have been unable to agree upon the types of Class III games permitted by the Act to be played by the Tribes; and

o. WHEREAS, The State takes the position that the Indian Gaming Regulatory Act authorizes Class III gaming activities on Indian Lands only if such activities are

provided for in a compact such as this and if other persons or entities in the State of Idaho are permitted by state law to engage in such activities. Accordingly, the only tribal Class III gaming activities that are legal in Idaho under federal law are those Class III gaming activities permitted by article 3, section 20 of the Idaho Constitution and not otherwise contrary to the criminal laws of the State of Idaho. Therefore, pursuant to federal law, tribal Class III gaming in Idaho is contrary to public policy and is strictly prohibited except for a lottery, pari-mutual betting and bingo or raffle games conducted in conformity with enabling legislation. Furthermore, no gaming activity shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, baccarat, keno and slot machines, or employ any electronic or electromechanical imitation or simulation of any form of casino gambling; and

p. WHEREAS, it is the position of the State that the electronic gaming currently conducted by the Tribes in Idaho is an imitation of casino games and prohibited by Idaho and federal law; and

q. WHEREAS, the Tribes take the position that under federal law, the Tribes are entitled to offer any gaming activity that is otherwise permitted by any person, organization, or entity for any purpose. Given the range and scope of gaming activities, with an emphasis on a multi-faceted state-sponsored entity, the State of Idaho cannot establish that any gaming activity, properly regulated to ensure the integrity of the game and protect the gaming patron, contravenes the State of Idaho's public policy for gaming. Further, in light of traditional understandings of the context and legislative history of Act, the State cannot establish that it has reasonably characterized the relevant state laws as completely prohibiting a distinct form of gaming. Accordingly, the Tribes are entitled to offer and regulate all forms of gaming except sports-betting; and

r. WHEREAS, the Tribes take the alternative position that if the State does establish that it has met the above-stated burden through the application of the Idaho State Constitution, article 3, section 20, the Tribes are entitled to offer electronic facsimiles of

any lottery game which can be reasonably defined as gaming owned and operated by government entities, or as games wherein the state/owner does not have a stake in the outcome of the game of chance; and

s. WHEREAS, both the Tribes and the State acknowledge that these are legal issues that should be resolved. In recognition of this, the Tribes and the State agree in this Compact to resolve issues that can be agreed upon and agree to establish a process for resolving the disputed matters.

NOW, THEREFORE, in consideration of the mutual undertakings and agreements hereinafter set forth, the Tribes and the State enter into the following Compact.

4. Authorized Class III Gaming

Class III Gaming shall be authorized consistent with the following:

a. Gaming Authorized. Following approval of this Compact as provided in the Act, the Tribes may operate in its gaming facilities located on Indian Lands, any gaming activity that the State of Idaho "permits for any purpose by any person, organization, or entity," as the phrase is interpreted in the context of the Indian Gaming Regulatory Act. The Tribes may not operate any other form of Class III gaming activity.

b. Location of Class III Gaming Activities. Class III gaming activities shall only be conducted on Indian Lands located within the exterior boundaries of the Fort Hall Indian Reservation as it existed as of the date of enactment of the Indian Gaming Regulatory Act or upon other Indian Lands as defined in the Indian Gaming Regulatory Act with the approval of the Governor. Nothing herein shall be interpreted as precluding a Governor from deciding whether to concur with the findings of the Secretary of the Interior that gaming on newly acquired lands would be in the best interest of the Shoshone-Bannock Tribes and not detrimental to the surrounding community.

c. Certification. Subsequent to a final non-appealable judgment in the initial Declaratory Judgment Action pursuant to Section 5, no gaming device shall be placed in the gaming facility for use until approved by the State. The Tribe shall make a good faith

effort to remove any devices that are in play at the time of the final non-appealable judgment that do not comply with the Declaratory Judgment. The State shall make a good faith effort to certify those games that are in play at the time of the non-appealable judgment that do comply with the Declaratory Judgment. If the parties disagree over games that are in play at the time of the final non-appealable judgment, the Tribes may continue to operate the games pending dispute resolution per Section 18.

d. Forms of Payment. All payment for wagers made in gaming conducted by the Tribes in their gaming operation shall be made by cash, chips or tokens. The gaming operation shall not extend credit. Chips or tokens may only be purchased using cash, checks or travelers checks.

e. Prohibited Activities. The Tribes shall limit their Class III gaming activities to those permitted by this Compact. In the event a dispute arises after the completion of the declaratory judgment action, and the implementation thereof as agreed to in Section 5, over whether an activity is or is not permitted under this Compact, the dispute shall be resolved pursuant to Section 18.

f. Advertising of Authorized Gaming. The Tribes may advertise their authorized gaming activities within the State of Idaho in an honest and truthful manner pursuant to federal law.

5. Initial Declaratory Judgment Action

The Tribes and the State agree that issues of what gaming the Tribes may conduct under the Act and what restrictions on the operations, if any, may be imposed by the State, are ultimately questions of law. However, the parties believe that presentation of facts regarding the actual gaming activity that does occur in the State and on Indian Lands and the machines that are at issue is necessary for the Court to resolve the questions of law.

a. Positions of Parties as to Jurisdiction

(1) It is the Tribes' position that the Act has vested exclusive jurisdiction in the United States District Courts to resolve disputes under the Act.

(2) The State does not consent to jurisdiction of the federal court over any claims under 25 USC 2710(d)(7)(A)(i). The State does reserve the right to consent to federal court jurisdiction over claims arising under this compact on a case-by-case basis.

b. Agreement to Participate in Initial Declaratory Judgment Action. Notwithstanding these positions, the Tribes and the State agree that either or both parties may file suit for declaratory judgment in the United States District Court for the District of Idaho naming the other as a defendant and seeking a declaration of the legal issues disputed in this Section. In pursuing this action:

(1) Both parties agree that they have obtained the necessary legislative and legal authority to bring the initial declaratory judgment action, merge declaratory judgment actions, or take other steps as may be necessary to participate in such an action on its merits. This agreement shall not in any way prejudice any right to appeal or seek review of any judgment.

(2) Both parties agree to expedite the proceedings and any appeal or review of any final order or judgment entered in such initial declaratory judgment action.

(3) Should the Tribes refuse to consent to jurisdiction as provided above, this Compact shall be null and void.

(4) Should the State refuse to consent to jurisdiction as provided above, any issue relating to the provisions of this Compact presented by the Tribes in their complaint or pleading shall be deemed to have been decided in favor of the Tribes' position on the issue.

(5) The Tribes agree to limit the scope of their gaming activities to those set forth in Section 4.

(6) This provision shall not be construed as a consent by the State to federal court jurisdiction in any action brought pursuant to 25 U.S.C. § 2710(d)(7)(A)(i).

c. Implementation of Initial Declaratory Judgment Decision. Upon the conclusion of all legal proceedings in the initial declaratory judgment action brought pursuant to Section 5. including the conclusion of all appeals or review. the appropriate provisions below shall apply:

(1) In the event the court(s) determines that certain gaming activities are not "permitted" in the context of the Act. the Tribes shall be precluded from offering those gaming activities in any gaming facilities on Indian Lands.

(2) In the event the court(s) determines that certain gaming activities are "permitted gaming" in the context of the Act. the Tribes shall be entitled to expedited implementation of such games as is consistent with the judgment. For this purpose. the Tribes may conduct such games as are consistent with that judgment upon conclusion of the expedited negotiations and/or arbitration set forth below.

(A) The parties agree to expedited negotiation of any issues which are proper subjects of negotiation under the Act consistent with the judicial resolution. Such issues shall be negotiated for thirty (30) days. For purposes of this section. "day" shall mean calendar day. Agreements reached in mediation shall have the same effect as if a part of this Compact. and are incorporated in full herein.

(B) If agreement cannot be reached. such issues shall be submitted to binding arbitration as follows:

(i) Either party shall serve written notice of intent to arbitrate on the other party on the final day of negotiation. The party serving notice of intent to arbitrate shall identify the specific provision(s) of this Compact and/or issues, which shall be submitted for arbitration.

(ii) Both parties shall within five (5) days of notice of intent to arbitrate provide a list of five (5) names of individuals available as prospective arbitrators. Each party shall. within five (5) days of the receipt of the other party's list. select a person from that list as an arbitrator. Within ten (10) days of their selection.

these two individuals shall select a third arbitrator from a list of not less than five (5) nominees from an independent arbitrators' or alternative dispute resolution organization. If the individuals do not agree upon such organization, it shall be the American Arbitration Association. The State and the Tribes agree that the arbitrators shall be required to submit their decision within ninety (90) days of the selection of the third arbitrator.

(iii) The arbitrators shall have authority to issue such orders and decisions as shall be reasonably necessary or desirable to bring about an expeditious decision consistent with the judicial decision made in the initial declaratory judgment action brought pursuant to Section 5.

(iv) Except as provided by Section 4, the Tribes agree not to conduct games pursuant to Section 4 until the completion of arbitration. However, if conclusion of the arbitration process is delayed for any reason, the arbitrators may permit gaming on such terms as they determine pending conclusion of arbitration.

(v) Arbitration expenses will be billed equally to the respective parties.

(vi) If judicial review of an arbitration decision is sought, the arbitration decision shall be effective unless and until determined otherwise by a federal court.

(vii) Except as may be determined by a federal court, arbitration decisions shall have the same effect as if a part of this Compact, and are incorporated in full herein.

(viii) Nothing herein shall preclude the parties from agreeing to an alternate form of dispute resolution.

(C) To ensure integrity, the Tribes agree that if additional games are permitted pursuant to the initial declaratory judgment action, such games shall be conducted in accordance with the operational, security, cash control and other standards

established in this Compact together with additional negotiated standards as restrictive as those of the National Indian Gaming Commission as set forth at 25 CFR 542 as published in the Federal Register, January 5, 1999, or the Nevada Gaming Commission for that particular game. Such restrictions shall be negotiated and/or arbitrated in the manner provided in Section 5(c).

6. Regulations and Ordinances Regulating the Operation and Management of the Gaming Operation

The Tribal Gaming Commission or the Business Council may, from time to time, adopt, amend or repeal such regulations or ordinances consistent with the policy, objectives, purposes and terms of this Compact as it may deem necessary or desirable in the interests of the Tribes and the State in carrying out the policy and provisions of this Compact. The Tribes have enacted an ordinance regulating the operation and management of the Gaming operation.

7. Background Investigations of Gaming Employees

a. Background Investigation Prior to Employment.

(1) Prior to hiring or licensing a prospective gaming employee, the Tribal Gaming Commission shall obtain sufficient information and identification from the applicant on forms to be furnished by the Tribal Gaming Commission to permit a thorough background investigation, together with such fees as may be required by the Tribes. The information obtained shall include, at a minimum, name (including any aliases), current address, date and place of birth, criminal arrest and conviction record, social security number, two sets of fingerprints, sex, height, weight, and two current photographs. Upon written request by the State, true and correct copies of this information shall be provided to the designated State agency, which may conduct an independent background investigation at the State's own expense and provide a written report to the Tribal Gaming Commission regarding each application.

(2) The Tribal Gaming Commission may license on a temporary basis any prospective Gaming employee, except cage and counting room personnel, who represents in writing that he or she does not fall within any of the criteria set forth below and who has passed a preliminary criminal background investigation by the Tribal Gaming Commission, until such time as the final written report on the applicant's background investigation is completed. For purposes of this paragraph, the Tribal gaming investigator, in conjunction with the designated law enforcement agency, shall notify the Gaming operation in writing of the preliminary criminal background check within ten (10) days of submission of such request.

(3) The Gaming Operation shall not hire or continue to employ a Gaming employee, and shall terminate any probationary Gaming employee, if the Tribal Gaming Commission determines that the applicant or employee:

(A) has been convicted of any offense related to gambling, fraud, misrepresentation, deception or theft, within the past ten (10) years;

(B) has provided materially false statements or information on his or her employment application or misstated or otherwise attempted to mislead the Tribes or the State with respect to any material fact contained in the employment application;

(C) is a member or associate of organized crime or is of notorious or unsavory reputation; or

(D) has a reputation, habits or associations that might pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto. It is intended that applicants and employees have the continuing burden to satisfy all doubts as to their fitness. Where doubt remains, an applicant or employee is not entitled to be hired or to remain employed.

b. Background Investigations of Gaming Employees. During employment, the Tribes and the State Gaming Agency shall retain the right to conduct such additional background investigations of any Gaming employee at any time during the term of that person's employment. At any time, any Gaming employee who does not establish that he or she satisfies all of the criteria set forth above shall be dismissed.

8. On-site Regulation of Gaming Operation

a. Tribal Gaming Commission. The primary responsibility for the on-site regulation, control and security of the Gaming operation and facility negotiated through this Compact shall be that of the Tribal Gaming Commission. The State Gaming Agency may participate in regulatory obligations of the Gaming operations and may work closely with the Tribal Gaming Commission. However, this shall only occur after the Tribal Gaming Commission requests in writing that the State Gaming Agency participate, or the State Gaming Agency provides written rationale to the Tribal Gaming Commission as to the need for the State Gaming Agency to participate in the regulatory obligations. Such state assistance shall not include traditional security and law enforcement functions.

As part of its responsibilities, the Tribal Gaming Commission shall ensure that the Gaming operation and manager will:

(1) Comply with all relevant laws;

(2) Provide for the physical safety of personnel employed by the Gaming operation;

(3) Provide for the physical safety of patrons in the Gaming facility;

(4) Provide for the physical safeguarding of assets transported to and from the Gaming facility and cashier's cage department;

(5) Provide for the protection of the patrons and the Gaming facility's property from illegal activity; and

(6) Ensure the integrity of the gaming operation.

b. Gaming Manager. The Business Council shall employ the Gaming manager. The Gaming manager shall serve at the pleasure of the Business Council and shall have overall responsibility for the administrative functions of the Tribal gaming operations.

c. Identification Cards. The Tribal Gaming Commission shall require all Gaming employees to conspicuously wear identification cards issued by the Tribal Gaming Commission which shall include the employee's photograph, first name, employee number, Tribal seal or signature, and a date of expiration.

d. Inspections. The Tribal Gaming Commission shall retain qualified inspectors or agents under the authority of the Tribal Gaming Commission as needed. Said inspectors or agents shall be independent of the Gaming operation and shall be supervised and accountable only to the Tribal Gaming Commission.

e. Reporting of Violations. During all hours of Gaming operation, the Tribal Gaming Commission shall ensure that its systems of internal control are in full force and effect. Tribal gaming inspectors or agents shall have unrestricted access to the Gaming facility during all hours of Gaming operations and shall have immediate and unrestricted access to any and all areas of the Gaming facility for the purpose of ensuring compliance with the provisions of this Compact and the ordinance. The Tribal Gaming Commission shall require that all inspectors, agents and Gaming employees report immediately to the Tribal Gaming Commission any suspected violation(s) of the provisions of this Compact or of the Ordinance or regulations. Upon written request which shall be submitted not more frequently than quarterly, the Tribal Gaming Commission shall submit to the State Gaming Agency a list of Gaming employees who have been found to have committed actual violations while they were employed for the Gaming operation and notification to the State as to any formal action taken by the Tribal Gaming Commission, and any civil or criminal actions that were taken against the employees.

f. Rules of the Games. The Tribal Gaming Commission shall notify the State Gaming Agency of the rules of each game operated by the Tribes and of any change in such rules. Summaries of the rules of each game relevant to the method of play and odds paid to winning bets shall be visibly displayed or available in pamphlet form in the Gaming facility. Betting limits applicable to any gaming station shall be displayed at such gaming station. Rules for games identified in Section 4 of this Compact or changes to such rules shall be based upon such games as commonly practiced in other gaming jurisdictions in the United States with such variations in the manner of wagering or play as do not fundamentally alter the nature of the game as the Tribal Gaming Commission may approve. Rules for games identified in Section 4 of this Compact or changes to such rules of this Compact shall be submitted to the State Gaming Agency for review. In the event the State Gaming Agency has concerns in regard to a change in the rules, it shall submit such concerns to the Tribal Gaming Commission for its review and comment. The Tribes will provide the State Gaming Agency with ten (10) days' advance notice of the rules of each game and any modification thereof, and will provide adequate notice to patrons of the Gaming facility to advise them of the applicable rules in effect.

g. Annual Meeting. In order to foster a positive and effective relationship in carrying out and enforcing the provisions of this Compact, representatives of the Tribes (including the Tribal Gaming Commission and the Gaming manager) and the State Gaming Agency shall meet, not less than on an annual basis, to review past practices and examine methods to improve the regulatory program created by this Compact. The meetings shall take place at a location mutually agreed upon by the Tribal Gaming Commission and the State Gaming Agency. The State Gaming Agency and the Tribal Gaming Commission shall disclose to each other at such meetings any and all suspected activities or pending matters reasonably believed to constitute violations of this Compact by any person or enterprise.

9. Gaming License Procedure

a. Gaming Operations. The Gaming operations negotiated by this Compact shall be licensed by the Tribal Gaming Commission pursuant to the requirements of the gaming licensing procedures of this Compact prior to the commencement of operations. The licensing of the Gaming operation shall include the licensing of each principal and of each key employee.

b. Manufacturers and Distributors of Gaming Devices. Each manufacturer and distributor of gaming devices permitted and defined under this Compact and their principals shall be required to be licensed by the Tribal Gaming Commission pursuant to the requirements of this Compact prior to the distribution of any gaming device for use or play in the Gaming facility; provided, however, that the Tribal Gaming Commission may determine suitability of a manufacturer or distributor through verification of its good standing in another jurisdiction where gambling is legal.

c. Persons Furnishing Gaming Services. The Tribal Gaming Commission may require a finding of suitability or require the licensing of any other person or entity who furnishes gaming services, property or an extension of credit to the Gaming operation or who has other material involvement with the Gaming operation. Any agreement between the Gaming operation and a person or enterprise that has been found unsuitable, has been denied a license, or has had a license revoked by the Tribal Gaming Commission shall be immediately rendered null and void without liability to the Tribes.

d. Filing. All applications for each principal, key employee, vendor, manufacturer and distributor of gaming devices shall be made on forms furnished by the Tribal Gaming Commission and shall be accompanied by the application and investigative fees set forth in the Tribes' published schedule of fees. Such application forms shall require, but not be limited to, complete information and details with respect to the applicant's habits, character, criminal record, business activities, financial affairs and business associates, covering at least a 10-year period immediately preceding the date of filing of the application.

e. Notification to State of Gaming Employees. The Tribal Gaming Commission shall submit a list of the licensed and temporarily licensed gaming employees to the State Gaming Agency on a monthly basis. The Tribal Gaming Commission shall include the licensee's complete name, A.K.A., social security number and date of birth in its submission to the State Gaming Agency. In the event the State Gaming Agency has a concern about a particular temporarily licensed gaming employee, the State Gaming Agency shall submit in writing to the Tribal Gaming Commission a request for the licensee's application so that the State Gaming Agency may complete its own background investigation on a particular individual. The Tribal Gaming Commission shall submit the requested application within ten (10) business days of receipt of the request. The State Gaming Agency may, at its sole cost and expense, commence an investigation and if it does so, the results of the investigation shall be submitted to the Tribal Gaming Commission in a timely manner. The Tribal Gaming Commission may grant, deny, condition, limit or revoke any license or finding of suitability for any cause it deems reasonable.

f. Notification of Applicant. The Tribal Gaming Commission shall establish reasonable time lines in regard to notification to an applicant of the action taken in regard to a licensing decision made by the Tribal Gaming Commission. The applicant shall not be entitled to receive a copy of the State Gaming Agency's investigative report or any reports or material developed by the Tribal Gaming Commission in connection with the application. The Tribal Gaming Commission shall not grant an application for a license or a finding of suitability unless it is satisfied that:

(1) The applicant is of good character, honesty and integrity;

(2) The applicant's prior activities, criminal record (if any), reputation, habits and associations do not pose a threat to the public interest of the Tribes or the State or the effective regulation and control of gaming pursuant to this Compact, or create or enhance the dangers of unsuitable, unfair or illegal practices, methods and activities in the

conduct of gaming or the carrying on of the business and financial arrangements incidental thereto:

(3) In all other respects, the applicant is qualified to be licensed or found suitable with the provisions and policies set forth in this Compact: and

(4) The applicant has adequate business probity, competence and experience in gaming.

g. Report of Changes. After an entity is licensed and found suitable, it shall file a report of each change of its corporate officers and members of its board of directors with the Tribal Gaming Commission. Also, the entity shall maintain with the Tribal Gaming Commission at all times a list of all persons holding or owning at least ten percent (10%) of the equity of the entity and lenders or creditors owed at least ten percent (10%) of the book value of the entity. The same process shall be followed that is listed above at "e" for changes in corporate officers and members of its board of directors in the event there is a change.

10. Confidentiality of Information; Privilege

a. Confidentiality. The Tribal Gaming Commission and the State Gaming Agency shall maintain a file of licensed applicants obtained pursuant to and in compliance with the provisions of this Compact, including findings of suitability and employment under this Compact, together with a record of all action taken with respect to those applications. Such file shall include but not be limited to information:

(1) Required by the Tribal Gaming Commission or the State Gaming Agency to be furnished to them under this Compact or the regulations or which may be otherwise obtained relative to the finances, earnings or revenue of a manager or any applicant, person or enterprise that is employed, licensed or found suitable:

(2) Pertaining to an applicant's criminal record and background, which has been furnished to or obtained by the Tribal Gaming Commission or the State Gaming Agency from any source:

(3) Provided to the members of the Tribal Gaming Commission or the State Gaming Agency or the Gaming manager by a governmental agency, an informer, or on the assurance that the information will be held in confidence and treated as confidential; and

(4) Obtained by the Tribal Gaming Commission or the State Gaming Agency from a manufacturer or distributor relating to the manufacturing of gaming devices.

b. Sharing of Information. The Tribal Gaming Commission and the State Gaming Agency may reveal such information and data to an authorized agent of any agency of the United States government, any authorized State agency or any other duly authorized regulatory or law enforcement agency of another state or tribe.

c. Notice of Release. Notice of the release of information pursuant to the above provisions may be given to the applicant, person or enterprise prior to being licensed or being found suitable.

d. Files. The files, records and reports concerning the Tribal Gaming Commission and the State Gaming Agency shall be open during regular business hours to inspection by each agency's authorized agents.

e. Absolute Privilege of Required Communications and Documents. Any communication or document of a manager, an applicant or a licensee which is required by this Compact or the Ordinance to be made or transmitted to the Tribal Gaming Commission or the State Gaming Agency, or any of their agents or employees, is absolutely privileged and does not impose liability for defamation or constitute a ground for recovery in any civil action. If such a document or communication contains any information that is privileged pursuant to the laws of the State, that privilege will not be waived or lost because the document or communication is disclosed to the Tribal Gaming Commission or State Gaming Agency, or any of their agents or employees. Notwithstanding the provisions of this subsection, the Tribal Gaming Commission and

the State Gaming Agency shall maintain all privileged information, documents and communications in a secure place accessible only to members of the Tribal Gaming Commission and the State Gaming Agency and their authorized agents and employees.

f. Non-Applicability of State Public Disclosure Laws. All information provided by the Tribes to the State pursuant to the terms of this Compact is provided in confidence and is to be kept strictly confidential unless disclosure is specifically agreed to by the Business Council. The State will seek to protect the confidentiality of such information. To the extent the State is unable to protect the confidentiality of such information, the Tribes' obligation to provide such information under the terms of this Compact shall be voidable by the Tribes until such time as the State is able to protect the confidentiality of such information.

11. Management Contract

The Tribes have no intention of hiring an outside management company to manage the Gaming operation. In the event the Tribes choose to engage an outside management company, the Tribes and the State shall negotiate amendments to this Compact in good faith pursuant to the Act.

12. Operational Requirements

a. Internal Control System. In addition to compliance with the Ordinance, regulations and the provisions of this Compact, the Gaming facility shall be operated pursuant to an internal control system approved by the Tribal Gaming Commission. The internal control system shall be designated to reasonably assure that:

(1) Assets are safeguarded;

(2) Financial records are accurate and reliable;

(3) Transactions are performed only in accordance with the management's authorization;

(4) Access to assets is permitted only in accordance with management's authorization;

(5) Recorded accountability for assets is compared with actual assets at reasonable intervals and appropriate action is taken with respect to any discrepancies; and

(6) Functions, duties and responsibilities are appropriately segregated and performed in accordance with sound practices by competent, qualified personnel.

b. Required Provisions of Internal Control System. The internal control system shall include:

(1) An organization chart depicting appropriate segregation of functions and responsibilities;

(2) A description of the duties and responsibilities of each position shown on the organizational chart; and

(3) A detailed narrative description of the administrative and accounting procedures designed to satisfy the requirements of subsection (a).

13. Public Health and Safety; Fees and Payments in Lieu of Taxes

a. Compliance. The construction, maintenance and operation of the Gaming facility shall comply with all federal and Tribal codes, laws and regulations governing buildings, safety, maintenance, plumbing, fire safety, electricity, entertainment, alcohol and handling of food and beverages. The applicable federal and Tribal officials charged with enforcement of such codes, laws and regulations must be provided access to inspect and ensure compliance.

b. Emergency Service Accessibility. The Tribes and the Tribal Gaming Commission shall make provisions for adequate emergency accessibility and service of the Gaming facility.

14. Tribal Reimbursement for Expenses Incurred by the State Gaming Agency

a. Tribes Reimburse State Expenses. The Tribes shall reimburse the State for only those expenses the State incurs as the result of fulfilling a written request of the Tribes relating to carrying out the responsibilities under this Compact. The Tribes shall

not be responsible for expenses the State may incur in connection with this Compact that have not been requested by the Tribes.

b. State Shall Submit Statement of Expenses. The State shall submit a detailed statement of expenses on a monthly basis to the Tribal Gaming Commission. The Tribes shall reimburse the State within thirty (30) days after the receipt of the statement of expenses

c. Notice of Objection to Expenses. If the Tribes believes that it has been assessed a charge for services that have not been requested by the Tribes in writing, or that they have been assessed a charge for services that are not related to the Tribes' gaming or that the charges are not reasonable or necessary, they shall notify the State that it objects to the charge. If the parties are not able to resolve such a dispute, they may resort to arbitration as provided in Section 18 of this Compact and the arbitrator may allow or disallow the disputed charge.

d. Information Regarding the State Budgeting Process. The State Gaming Agency shall advise the Tribes of its requests for appropriations dealing specifically with tribal gaming. Except where impracticable due to exigent circumstances, such information shall be provided at least two (2) months prior to submission of a proposed budget to the State Legislature.

15. **Audits**

At the close of the fiscal year (commencing with the current Tribal fiscal year), the Tribes shall engage an independent certified public accountant to audit the books and records of all Gaming operations conducted under this Compact. The audit shall be completed within one hundred twenty (120) days after the close of the fiscal year. Upon completion of the audit, the Tribes shall forward copies of any audit reports and management letters to the State Gaming Agency and shall make copies of all current internal accounting and audit procedures available to the State upon written request.

16. ***State Oversight of Compact Provisions***

a. Monitoring and Inspection. The State Gaming Agency, pursuant to the provisions of this Compact, has the limited authority to monitor and inspect the Gaming operation to ensure that the Gaming operation is conducted in compliance with the provisions of this Compact, the Ordinance and applicable regulations. In order to properly monitor the Gaming operation, no more than two (2) agents of the State Gaming Agency on any given day along with at least one member of the Tribal Gaming Commission or other tribal designee shall review and examine any area of the Gaming operation that is directly related to Class III gaming. Said review and examination shall not interfere with the normal functioning of the Gaming operation. Said state agent(s) shall be previously identified as such in writing to the Tribal Gaming Commission and shall provide proper identification at the time of inspection to the appropriate Tribal representatives.

b. Review and Examination of Records. Upon the completion of any review and examination by the Tribal Gaming Commission or the State Gaming Agency, copies of the findings shall be maintained by both parties and shall be shared if so requested.

c. Independent Compliance Audit. The State Gaming Agency shall be supplied with the federally required Independent Compliance Audit annually as is submitted to the NIGC by the Tribes. In the event the State Gaming Agency has a concern with the federally required Independent Compliance Audit, the State Gaming Agency shall notify the Tribal Gaming Commission in writing and then a joint effort between the State Gaming Agency and the Tribal Gaming Commission shall take place in the selection of an independent auditor. Copies of the results of the Compliance Audit shall be submitted to both gaming agencies within ten (10) days of completion if possible.

d. Good Faith. The State shall exercise its rights under this Compact in good faith and in a manner that does not interfere with the day to day operations of the Gaming facility.

17. **Criminal Jurisdiction**

a. Tribal Criminal Jurisdiction. Except as limited by subsection (c) below, in enforcing the terms and provisions of this Compact and any ordinance implementing the Compact, the Tribes shall exercise exclusive criminal jurisdiction over Indians.

b. State Criminal Jurisdiction. Except as limited by subsection (c) below, in enforcing the negotiated terms and provisions of this Compact, the State shall exercise exclusive criminal jurisdiction over non-Indians. The Tribes agree to cooperate with the State in any criminal investigation being conducted pursuant to this subsection and to provide any information in the Tribes' possession relative to a criminal proceeding being conducted by the State. For purposes of State enforcement, all State criminal laws and such laws as hereafter amended pertaining to the licensing, regulation or prohibition of gaming and gambling which are not inconsistent with this Compact, including the sanctions associated with such laws, are adopted and incorporated herein by reference.

c. Federal Criminal Jurisdiction. Nothing contained herein shall be deemed to modify or limit existing federal criminal jurisdiction over the Gaming operation negotiated under this Compact or over individuals who commit gaming-related offenses.

18. General Dispute Resolution

The following resolution process, including but not limited to the judicial resolution process, shall apply exclusively for the resolution of issues arising under the provisions of this Compact.

a. Compliance. If either party believes the designated representative of the other party has failed to comply with any of the provisions of this Compact, it shall invoke the following procedure:

(1) Informal Dispute Resolution.

(A) The party asserting noncompliance shall serve written notice upon the other party. The party asserting the noncompliance shall identify the specific provision of this Compact alleged to have been violated and shall specify the factual basis

thereof. The State and the Tribes shall thereafter meet within ten (10) days in an effort to resolve the dispute.

(B) If the dispute is not resolved to the satisfaction of the parties within thirty (30) days after the service of the notice set forth above, either party may pursue the remedies below:

(2) Arbitration.

If agreement cannot be reached, such issues shall be submitted to binding arbitration as follows:

(A) Either party shall serve written notice of intent to arbitrate on the other party on the final day of negotiation. The party serving notice of intent to arbitrate shall identify the specific provision(s) of this Compact and/or issues, which shall be submitted for arbitration.

(B) Both parties shall within five (5) days of notice of intent to arbitrate provide a list of five (5) names of individuals available as prospective arbitrators. Each party shall, within five (5) days of the receipt of the other party's list, select a person from that list as an arbitrator. Within ten (10) days of their selection, these two individuals shall select a third arbitrator from a list of not less than five (5) nominees from an independent arbitrators' or alternative dispute resolution organization. If the individuals do not agree upon such organization, it shall be the American Arbitration Association. The State and the Tribes agree that the arbitrators shall be required to submit their decision within ninety (90) days of the selection of the third arbitrator.

(C) The arbitrators shall have authority to issue such orders and decisions as shall be reasonably necessary or desirable to bring about an expeditious decision consistent with the judicial decision made in the initial declaratory judgment action brought pursuant to Section 5.

(D) Except as provided by Section 4. the Tribes agree not to conduct games pursuant to Section 5(c)(2) until the completion of arbitration. However, if conclusion of the arbitration process is delayed for any reason, the arbitrators may permit gaming on such terms as they determine pending conclusion of arbitration.

(E) Arbitration expenses will be billed equally to the respective parties.

(F) Except as may be determined by a federal court, arbitration decisions shall have the same effect as if a part of this Compact, and are incorporated in full herein. They shall be in effect unless and until determined otherwise by a federal court.

(G) Nothing herein shall preclude the parties from agreeing to an alternate form of dispute resolution.

(3) Judicial Resolution.

(A) Upon completion of the informal dispute resolution process of subsection (1) and (2), both the State and the Tribes consent to the jurisdiction of the United States Federal Court, District of Idaho, for the resolution of any dispute arising from activities governed by this Compact.

(B) If the Tribes do not consent to federal court jurisdiction with respect to any action brought by the State of Idaho to enforce the provisions of this Compact, the State shall notify the Secretary of the Interior of that fact and shall mail a copy of said notice to the NIGC and the Tribes. This Compact shall be null and void five (5) business days after the Tribes' receipt of such notice, unless the Tribes consent to federal court jurisdiction within that time.

(C) If the State refuses to consent to federal court jurisdiction with respect to any action brought by the Tribes to enforce the provisions of this Compact, the Tribes shall notify the Secretary of the Interior of that fact and shall mail a copy of such notice to the National Indian Gaming Commission and to the State. Unless

the State consents to federal court jurisdiction within five (5) days of receipt of such notice, the relief requested by the Tribes in its Complaint filed with the federal court shall be deemed granted and incorporated into this Compact as if fully set forth herein.

(4) No Third Party Rights. Nothing herein shall be interpreted as providing standing to any person or entity other than the Tribes, the State, or the United States to bring an action for enforcement of the terms of this Compact.

(5) Post Compact Meetings. The Tribes and the State agree to meet periodically as may be needed in an effort to enhance good relations and to facilitate the orderly operation of the matters addressed in this Compact

19. **Reservation of Rights Under the Act**

a. Status of Class II Gaming. Nothing in this Compact shall be deemed to affect the operation by the Tribes of any Class II gaming as defined in the Act, whether conducted within or without the Gaming facility or gaming facilities, or to confer upon the State any jurisdiction over such Class II gaming conducted by the Tribes.

b. No Authorization to Tax. Except as provided in Section 14, nothing in this Compact shall be deemed to authorize the State or any political subdivision thereof to impose any tax, fee, charge or assessment upon the Tribes or the Gaming operation. Nothing in this Compact shall authorize or permit the collection and payment of any Idaho tax or contribution in lieu of taxes or fees on or measured by gaming transactions, gaming devices permitted under this Compact, gross or net Gaming revenues, or the Tribes' net income. Nothing in this Section is intended to affect the State's right to tax income as permitted by law.

c. Preservation of Tribal Self-Government. Except as set forth in this Compact, nothing shall be deemed to authorize the State or any political subdivision thereof to regulate in any manner the government of the Tribes, including the Tribal Gaming Commission, or to interfere in any manner with the Tribes' selection of its government officers, including members of the Tribal Gaming Commission.

20. Operation of State Lottery

The Idaho State Lottery, which includes Idaho State Lottery vendors, may operate within the Fort Hall Indian Reservation subject to the terms and conditions listed below:

a. The Idaho State Lottery may operate only with the Tribes' permission, and the Tribes may rescind permission at the sole discretion of the Tribes;

b. The Idaho State Lottery must honor any requirements or conditions that the Tribes may require; and

c. The Tribes will provide the Idaho State Lottery thirty (30) days' written notice of any requirements, conditions, or withdrawal of permission to operate in order to allow the Idaho State Lottery adequate time to fully comply with any Tribal requirements.

21. Consent does not constitute a waiver

Consent by either party to jurisdiction of the federal courts in any one action shall not constitute a waiver of future rights to assert a lack of jurisdiction in any other action.

22. Severability

Each provision, section and subsection of this Compact shall stand separate and independent of every other provision, section and subsection. In the event that a federal court finds any provision, section or subsection of this Compact to be invalid, the remaining provisions, sections and subsections of this Compact shall remain in full force and effect.

23. Notices

All notices required or authorized to be served under this Compact shall be served by certified mail, return receipt requested, by commercial overnight courier service or by personal delivery at the following addresses:

State: State Gaming Agency
c/o Director, Idaho State Lottery
1199 Shoreline Lane, Suite 100
Boise, ID 83702

Tribes: Chairman, Fort Hall Business Council
Shoshone Bannock Tribes
P.O. Box 306
Fort Hall, ID 83203

And

Chairman, Shoshone-Bannock Gaming Commission
P.O. Box 1001
Fort Hall, ID 83203

24. Effective Date and Duration

a. Effective Date. This Compact shall become effective upon execution by the Governor of the State and the Chairman of the Tribes, and upon certification by the Governor that the legislature has ratified the compact and authorized waiver of the State's Eleventh Amendment immunity, upon certification by the Tribal Chairman that the Tribes have adopted a resolution authorizing waiver of sovereign immunity and upon approved by the Secretary of the Interior and publication in the Federal Register pursuant to the Act.

b. Renegotiation. The State and the Tribes may, by appropriate and lawful means, request negotiations to amend or replace this Compact. In the event of a request for renegotiation, this Compact shall remain in effect until renegotiated or replaced. Such requests shall be in writing and shall be sent by certified mail to the Governor of the State or the Chairman of the Tribes at the appropriate governmental office.

c. Changes in Federal Law. In the event federal law regarding gaming on Indian Lands shall change, any provision of this Compact which may be inconsistent with such change shall be void only to the extent necessary to conform to said change.

d. Games Conducted by Other Tribes in Idaho. In the event any other Indian tribe is permitted by compact or final court decision to conduct any Class III games in Idaho in addition to those games permitted by this Compact, this Compact shall be amended to permit the Tribes to conduct those same additional games. A final court

decision shall mean a final decision of a federal court or Idaho court once it is no longer capable of change by reconsideration, appeal, review or *certiorari*.

25. Amendments

This Compact cannot be amended except in writing by the State and the Tribes as provided in Section 23.

26. Entire Agreement

This Compact contains the entire agreement of the parties hereto with respect to the matters covered by this Compact and no other statement, agreement or promise made by any party, officer or agency of any party shall be valid or binding. The Tribes and the State shall not enter into any other compact affecting the Gaming operation, except as amended to this Compact as provided hereinabove.

27. Governing Law

This Compact shall be governed by and construed in accordance with the laws of the United States.

28. Triplicate Originals

This Compact shall be executed in triplicate originals, one for each of the signatures. Each and all are equally valid.

29. Authority to Execute

Each of the undersigned represents that he or she is duly authorized and has the authority to execute this Compact on behalf of the party for whom he or she is signing.

IN WITNESS WHEREOF, the parties have executed this Compact on the day and year set forth below.

STATE OF IDAHO

By _____
Dirk Kempthorne, Governor

Dated: February 18, 2000

SHOSHONE-BANNOCK TRIBES

By _____
Chairman

Dated: February 18, 2000

SHOSHONE-BANNOCK GAMING COMMISSION

By _____
Saundra Todd, Chairperson

Dated: February 18, 2000

CERTIFICATION OF AUTHORIZATION TO WAIVE SOVEREIGN IMMUNITY

I HEREBY CERTIFY that the Tribes have adopted a resolution authorizing waiver of sovereign immunity as contemplated in this Compact.

SHOSHONE-BANNOCK TRIBES

By _____
Chairman

Dated: February 18, 2000

CERTIFICATION OF LEGISLATIVE RATIFICATION AND AUTHORIZATION TO WAIVE ELEVENTH AMENDMENT IMMUNITY

I HEREBY CERTIFY that the Legislature of the State of Idaho has enacted a statute ratifying this Compact and authorizing the waiver of Eleventh Amendment immunity as contemplated in this Compact.

STATE OF IDAHO

By _____
Dirk Kempthorne, Governor

Dated: February 18, 2000

UNITED STATES
DEPARTMENT OF THE INTERIOR

By_____
_____, Secretary

Dated: February 18, 2000

EXHIBIT 5

MEMORANDUM DECISION AND ORDER DATED April 9, 2004 (filed on April 12, 2004 in *Shoshone-Bannock Tribes v. State of Idaho et al.*, Nos. CIV 01-52-E-BLW & CIV 01-171-E-BLW (D. Idaho))

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SHOSHONE-BANNOCK TRIBES, a federally recognized tribe,

Plaintiff,

v.

STATE OF IDAHO and the IDAHO STATE LOTTERY,

Defendants.

STATE OF IDAHO and the IDAHO STATE LOTTERY,

Plaintiffs,

v.

SHOSHONE-BANNOCK TRIBES, a federally recognized tribe; the FORT HALL BUSINESS COUNCIL; and the SHOSHONE-BANNOCK TRIBAL GAMING COMMISSION,

Defendants.

Case Nos. CV-01-052-E-BLW
CV-01-171-E-BLW

(Consolidated Cases)

MEMORANDUM DECISION AND ORDER

Pending before the Court are Plaintiff/Defendant Shoshone-Bannock Tribes' ("Tribe") and Defendants/Plaintiffs the State of Idaho's and the Idaho

State Lottery's (collectively referred to as "State of Idaho") cross motions for summary judgment.

The issue to be decided in this case is whether the Tribe and the State of Idaho must renegotiate their existing Tribal-State Compact ("Compact") before the Tribe is permitted to operate tribal video gaming machines, as defined by I.C. § 67-429B. For the reasons stated below, the Court finds that the Compact does not require the Tribe and the State of Idaho to enter into renegotiations before the Tribe is authorized to conduct gaming using tribal video gaming machines. Therefore, the Court will grant the Tribe's Motion for Partial Summary Judgment and deny the State of Idaho's Motion for Partial Summary Judgment.

BACKGROUND

The Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. §§ 2701-2721, provides a comprehensive framework for regulating gaming on Indian land. The IGRA divides Indian gaming into three classes, each subject to varying degrees of tribal, state and federal regulation. Class I gaming is defined as social games for prizes of minimal value, and traditional forms of Indian gaming conducted as part of tribal ceremonies and celebrations. § 2703(6). Class I gaming is within the exclusive jurisdiction of Indian tribes and is not subject to state or federal regulation. §2710(a)(1). Class II gaming includes bingo and related

games. § 2703(7). Class II gaming is within the exclusive jurisdiction of Indian tribes subject only to federal oversight. §2710(a)(2). Class III gaming, the type of gaming at issue in this case,[1] "means all forms of gaming that are not class I gaming or class II gaming." § 2703(8). Class III gaming activities may be conducted on Indian lands only if it is conducted in conformance with a Tribal-State compact. § 2710(d)(1).

On February 18, 2000, the Tribe and State of Idaho entered into a Compact pursuant to the IGRA.[2] The Compact governs "the licensing, regulation and operation of Class III gaming conducted by the Tribe[] on Indian Lands located within the State [of Idaho] . . . ." Complaint Ex. A at 5 (Docket No. 1). The parties "agreed that the conduct of Class III gaming under the terms and conditions set forth [in the Compact would] benefit the Tribe[] and protect the citizens of the Tribe[] and of the State [of Idaho] . . . ." *Id.* at 4.

Section Four of the Compact authorizes the Tribe to conduct any Class III gaming activity "that the State of Idaho 'permits for any purpose by any person, organization, or entity,' as the phrase is interpreted in the context of the Indian

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[1] The parties do not dispute that the tribal video gaming machines at issue in this case fall under the definition of Class III gaming.

[2] On September 8, 2000, the Compact was approved by the Secretary of the Interior as required by § 2710(d)(8). *See* 65 Fed. Reg. 54541 (Sept. 8, 2000).

Gaming Regulatory Act." *Id.* at 7. At the time the parties entered into the Compact, they could not agree upon the types of Class III games the State of Idaho permitted other persons, organizations, or entities to conduct. *See id.* at 5-6. More specifically, Idaho took the position that "the electronic gaming [i.e. Class III gaming] currently conducted by the Tribe[] in Idaho is an imitation of casino games and prohibited under Idaho and federal law . . . ." *See id.* at 6. The Tribe disagreed. *See id.* As a consequence, the parties included in the Compact a provision allowing either party to seek a declaratory judgment to determine the types of Class III games authorized by the Compact. *See id.* at 8. Accordingly, on January 31, 2001, and on April 18, 2001, the Tribe and the State of Idaho respectively filed suit in this court seeking declaratory relief. *See Shoshone-Bannock Tribes v. Idaho*, CV-01-52-E-BLW; *Idaho v. Shoshone-Bannock Tribes*, CV-01-171-E-BLW. On May 4, 2001, the Court consolidated the two cases pursuant to a stipulation between the parties. *See* Scheduling Order (Docket No. 12).

Shortly after the Tribe filed suit, the parties notified the Court that if Idaho Senate Bill 1211 (2001), then pending, was passed, the Court could either dismiss this case or stay the action. Senate Bill 1211 would have allowed Indian Tribes to operate "tribal gaming devices" if the Tribe had a valid Tribal-State Compact in

place that authorized it do so. *See* S. 1211 § 1, 56th Leg., Reg. Sess. (Idaho 2001). The "tribal gaming devices" referenced in the Senate Bill are the equivalent of the "gaming machines" referred to in I.C. § 67-429B and are the focus of this case. *Compare* S. 1211 § 4, 56th Leg., Reg. Sess. (Idaho 2001); *with* I.C. § 67-429B. The parties stipulation to dismiss the case if Senate Bill 1211 was passed included a provision requiring the Tribe to limit the aggregate number of tribal gaming devices/machines to that of certain other Idaho tribes. This agreement never came to fruition however, as Senate Bill 1211 was defeated by a vote of 15 to 20 in the Idaho Senate on March 26, 2001. *See* S. 1211, 56th Leg., Reg. Sess. (Idaho 2001); *see also* Declaration of Scott Crowell, Ex. D (Docket No. 32).

A little over a year later, on June 26, 2002, the parties again informed the Court that pending legislation could render this entire action moot. *See* Stipulation at 3 (Docket No. 15). On May 9, 2002, the Idaho Secretary of State certified a voter initiative that included a provision authorizing Indian Tribes to conduct gaming using "tribal video gaming machines." The initiative was placed on the November 2002 ballot and was referred to as "Proposition One." Section Two of Proposition One, the findings and purposes clause, noted that Tribes have suffered from a disproportionate amount of unemployment and poverty and that

recently Tribes have "proceeded in good faith to make major investments in Indian gaming facilities, and [that] those facilities have finally enabled the tribes to reduce unemployment and welfare and improve living conditions on their reservations." *See* Proposition One, Indian Gaming and Self-Reliance Act, (November 5, 2002), *available at* http://www.idsos.state.id.us/elect/inits/02init01.htm; *see also* Declaration of Scott Crowell, Ex. F at 1-2 (Docket No. 32); Stipulation Att. A at 3 (Docket No. 15).

Section Two went on to state that:

> Due to differences in opinion over the interpretation of Idaho law, . . . tribes face legal uncertainties about the types of gaming machines they can operate on Indian lands. This uncertainty threatens the future of Indian gaming in Idaho and the ability of these tribes to continue their progress toward economic self-reliance.
>
> Attempts by the tribes and the governor to resolve these legal uncertainties have failed, jeopardizing the future of tribally-funded education, health care, and social service programs. Therefore, the citizens of Idaho desire to secure the future of tribal gaming on Indian lands in Idaho themselves through this ballot measure.
>
> This ballot measure clarifies that it is the public policy of the State of Idaho that Indian tribes can continue to operate the types of lottery-style gaming machines currently used at Indian gaming facilities on Idaho reservations under the terms of this act.

Id. As is evident by Clause Two of Proposition One, voters were aware of the

disagreement between the Tribes and the State of Idaho over the gaming machines at issue in this case. Proposition One was approved by voters on November 5, 2002, and as a consequence, two new sections were added to the Idaho Code – I.C. §§ 67-429B & 67-429C.[3]

Section 429B of Title 67 of the Idaho Code allows "Indian Tribes . . . to conduct gaming using tribal video gaming machines pursuant to state-tribal gaming compacts which specifically permit their use." I.C. § 67-429B(1). This section also defines what a "tribal video gaming machine" is. *See id.* Section 429C of Title 67 of the Idaho Code provides a mechanism for Tribes to amend their Compact to "specifically" permit the use of tribal video gaming machines. *See* I.C. § 67-429C. Shortly after Proposition One was passed the Coeur d'Alene Tribe, the Kootenai Tribe, and the Nez Perce Tribe, followed the procedures outlined in § 429C in order to amend their Tribal-State Compacts to specifically authorize the use of tribal video gaming machines. *See* Affidavit of Miren E. Artiach, Exs. 1-3 (Docket No. 36). Those tribes' compacts now provide that the tribes may conduct gaming using tribal video gaming machines. *See id.*; I.C. §

[3] Shortly after Proposition One was passed, it was challenged as unconstitutional under the Idaho State Constitution. The Supreme Court however, declined to rule on the matter holding that it did not have original jurisdiction to hear the case. *See Bell v. Cenarrusa*, No. 29226 (Idaho June 5, 2003), *available at* http://www.isc.idaho.gov/opinions/29226.pdf.

67-429C.

Given that other Tribes located in the State of Idaho are now allowed to utilize tribal video gaming machines, the State of Idaho no longer takes the position that the Shoshone-Bannock Tribes[4] is completely precluded from using tribal video gaming machines. Rather, the State says that before the Tribe may utilize such machines the Tribe must submit to renegotiations concerning the terms of the Compact. Presumably, the State of Idaho would like to amend the Compact to provide more regulations that specifically address tribal video gaming machines. The State of Idaho relies upon Section 24(d) of the Compact to support its argument. Section 24(d) is a "most favored nations" clause that states: "In the event any other Indian tribe is permitted by compact or final court decision to conduct any Class III games in Idaho in addition to those games permitted by this compact, this Compact *shall be amended* to permit the Tribes to conduct those same additional games." *See* Complaint Ex. A at 30 (Docket No. 1) (emphasis added). The State of Idaho argues that Section 24(d) requires that the Compact be amended before the Shoshone-Bannock Tribe is authorized to use tribal video gaming machines. The State also argues that the amendment process necessarily

[4] The Shoshone and Bannock Tribes is a single federally recognized Indian Tribe; hence, the reference to "Tribes" although plural at first glance, is a reference to a single entity.

entails renegotiation.

The Tribe on the other hand, takes the position that Section Four of the Compact clearly authorizes the Tribe to conduct any Class III gaming activity that any other tribe in the State of Idaho is allowed to conduct. Therefore, the Tribe argues that, regardless of Section 24(d), no amendment is necessary given the fact that other tribes located in the State of Idaho are permitted to use tribal video gaming machines. Alternatively, the Tribes argue that even if Section 24(d) requires the Compact to be amended before the Tribes are allowed to offer tribal video gaming machines, it does not require the Tribe to submit to renegotiations. Rather, the Tribe argues that at most, Section 24(d) requires a brief amendment clarifying that the tribe is authorized to conduct gaming using tribal video gaming machines. The Tribe asserts that such an amendment should be adopted automatically and is not contingent upon renegotiating other parts of the Compact.

DISCUSSION

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). This

same standard applies to a motion for partial summary judgment. *See United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1116 (9th Cir. 2004).

A tribal-state compact is equivalent to a contract. *See Texas v. New Mexico*, 482 U.S. 124, 128 (1987) ("'a Compact is, after all, a contract") (quoting *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 285 (1959)); *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) (applying contract law to tribal-state compact). Summary judgment is an appropriate device for resolving the issues presented by the parties as issues relating to contract interpretation are generally questions of law. *See Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1442 (9th Cir. 1986). Only if the contract in question is ambiguous, does it present a question of fact. *See Nat'l Union Fire Ins. Co. of Pittsburgh Penn. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). "The fact that the parties dispute a contract's meaning does not establish that the contract is ambiguous; it is only ambiguous if reasonable people could find its terms susceptible to more than one interpretation." *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 2000).

Section Twenty-Seven of the Compact contains a choice of law provision that states: "This Compact shall be governed by and construed in accordance with the laws of the United States." Hence, the Court finds that federal law governs the

interpretation of the contract. *See* Restatement (Second) of Conflict of Laws § 187 (1988). When a court interprets a contract governed by federal law, it looks to general principles for interpreting contracts. *See Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir. 1989).

"Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself." *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 2000). In addition, "'[a] written contract must be read as a whole and every part interpreted with reference to the whole.'" *See id.* (quoting *Shakey's Inc. v. Covalt*, 704 F.2d 426, 434 (9th Cir. 1983)). "[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." Restatement (Second) of Contracts § 203 (1981). However, "when provisions are inconsistent, specific terms control over general ones." *S. Cal. Gas Co. v. Santa Ana*, 336 F.3d 885, 891 (9th Cir. 2003); *see also* Restatement (Second) of Contracts § 203 (1981).

As was stated above, the issue presented to the Court is whether the Tribe and the State of Idaho must renegotiate their existing Tribal-State Compact ("Compact") before the Tribe is permitted to operate tribal video gaming

machines. Resolution of this dispute requires the Court to analyze the interplay of Section Four and Section 24 of the Compact. The first gives the Tribe an undisputed right to conduct any gaming activity legally conducted by any other person, organization, or entity within the State of Idaho. The parties do not dispute the fact that the Coeur d'Alene Tribe, the Kootenai Tribe, and the Nez Perce Tribe legally operate tribal video gaming machines within the State of Idaho. Hence, both parties agree that Section Four authorizes the Tribe to also operate tribal video gaming machines. The real dispute centers upon Section 24(d) of the Compact. Section 24(d) states:

> Games Conducted by Other Tribes in Idaho. In the event any other Indian tribe is permitted by compact or final court decision to conduct any Class III games in Idaho in addition to those games permitted by this Compact, this Compact shall be amended to permit the Tribes to conduct those same additional games. A final court decision shall mean a final decision of a federal court or Idaho court once it is no longer capable of change by reconsideration, appeal, review or *certiorari*.

Complaint Ex. A at 30 (Docket No. 1). The State of Idaho argues that this provision explicitly requires the Compact to be amended prior to the Tribe being authorized to operate tribal video gaming machines. In response, the Tribe argues that Section 24(d) is moot in light of the Ninth Circuit's recent ruling in *Artichoke*

Joe's California Grand Casino v. Norton, 353 F.3d 712 (9th Cir. 2003) ("*Artichoke Joe's*"). *Artichoke Joe's* held that the phrase "any person, organization, or entity," referenced in the IGRA at 25 U.S.C. § 2710(d)(1)(B), includes Indian tribes. *See id.* at 731. The Tribe argues that Section 24(d) was inserted into the Compact to ensure that the Tribe would be allowed to offer any game offered by another tribe located in Idaho regardless if the IGRA was interpreted such that the phrase "any person, organization, or entity" did not include an Indian tribe. The Tribe asserts that if *Artichoke Joe's* had been decidedly differently, Section 24(d) would have provided the Tribe with the means to amend their Compact to offer any Class III gaming offered by other tribes located in Idaho. However, given the decision in *Artichoke Joe's*, the Tribe argues that Section 24(d) is moot. Hence, the Tribe argues that Section Four is the only provision relevant to the present issue.

The Court, however, cannot accept the Tribe's argument in the absence of evidence that this was the meaning attached to Section 24(d) by the parties. *See* Restatement (Second) of Contracts § 212 Comment (b) (1981). As a consequence, the Court must decipher the meaning of Section 24(d) from the text itself. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 2000).

At first glance Section 24(d) may appear entirely superfluous in light of Section Four, which allows the Tribe to conduct any Class III gaming activity conducted by any other person, organization, or entity, including an Indian tribe located in the State of Idaho. Therefore, the question becomes if, pursuant to Section Four, the Tribe may conduct any type of Class III gaming conducted by other tribes in the State of Idaho, why would an amendment ever be necessary under Section 24(d)? The Court can decipher no reason other than that the parties intended that any enlargement of Section Four be expressed in writing. Section 25 of the Compact provides that the "Compact cannot be amended except in writing by the State and Tribe[] as provided in Section 23." *Complaint* Ex. A at 31 (Docket No. 1). Section 23 provides that "all notices required or authorized to be served under this Compact shall be served" upon the Idaho State Gaming Agency and the Chairman of the Fort Hall Business Council. Complaint Ex. A at 29-30 (Docket No. 1). Section 23 does not outline any other procedures for amendment. *See id.* Noticeably absent from Sections 23, 24(d), and 25, are any requirements that, prior to an amendment, the parties must renegotiate any part of the Compact.

Therefore, the Court finds that Sections 23, 24(d), and 25, are merely administrative provisions requiring the Tribe to serve upon the Idaho State Gaming Counsel a brief amendment clarifying that the Tribe is authorized to

operate tribal video gaming machines. Such an amendment is desirable, given the prior disagreements between the parties concerning the exact type of gaming allowed under the Compact. In sum, the amendment process outlined in Sections 23, 24(d), and 25 provide a mechanism to ensure that there is a semblance of certainty as to the type of gaming allowed under the Compact. This interpretation is consistent with § 203 of the Restatement (Second) of Contracts as it gives meaning to every provision of the Compact.

Furthermore, the Court finds that Section 24(d) is not ambiguous such that the Court would be required to consider extrinsic evidence of the parties' intent behind this provision. Rather the Court finds that, because Section 24(d) states that an amendment *"shall"* be made and there being no language to the effect that such an amendment is conditioned upon renegotiation, Section 24(d) clearly does not require the parties to enter into negotiations prior to adoption of a Section 24(d) amendment. As a consequence, the State may not decline to accept the amendment on the grounds that the amendment was not negotiated. Had the State of Idaho desired that amendments pursuant to Section 24(d) be conditioned upon negotiation, it could have easily inserted language to that effect. Inasmuch as the State of Idaho invites the Court to write such a condition into the Compact, the Court declines the offer.

The Court must also disagree with the State of Idaho's argument that Section 24(b) of the Compact requires the parties to engage in negotiations prior to adoption of a Section 24(d) amendment. Section 24(b) provides that either the State of Idaho or the Tribe may request negotiations to amend or replace the Compact. Nowhere in Section 24(d) is there a reference to Section 24(b). Section 24(b) addresses only those situations where either the Tribe or the State of Idaho *would like* to amend the Compact, not where they *must* amend the Compact. Pursuant to Section 24(b), the State may request that the Tribe negotiate additional regulations concerning the tribal video gaming machines, but the State may not delay adoption of a mandatory Section 24(d) amendment because negotiations entered into under Section 24(b) are unresolved.[5]

CONCLUSION

After carefully reviewing the record and the law, the Court concludes that no genuine issue of material fact exists which precludes entry of partial summary judgment on behalf of the Tribe. In sum, the Court finds that as a matter of law the Compact does not require the Tribe and the State of Idaho to enter into

[5] Interestingly, the Court's interpretation of the Compact is similar to that of the Idaho Attorney General's initial review of this matter. *See* Declaration of Scott Crowell, Ex. G at 4 (Docket No. 32). The Court however, disavows any reliance upon the Attorney General's initial assessment for purposes of the Court's decision.

renegotiations before the Tribe is authorized to conduct gaming using tribal video gaming machines. However, the Court also finds that, pursuant to Section 24(d), the parties must adopt a brief written amendment clarifying that the Tribe is authorized to operate "tribal video gaming machines" as that term is defined in *I.C. § 67-429B.*

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that the Shoshone-Bannock Tribes' Motion for Partial Summary Judgment (Docket No. 29) is GRANTED.

IT IS FURTHER ORDERED that the State of Idaho's and the Idaho State Lottery's Motion for Partial Summary Judgment (Docket No. 33) is DENIED.

Dated this 9th day of April, 2004.

B. LYNN WINMILL
Chief Judge, United States District Court

United States District Court
for the
District of Idaho
April 12, 2004

* * CLERK'S CERTIFICATE OF MAILING * *

Re: 4:01-cv-00052
4:01-cv-00171

I certify that I caused a copy of the attached document to be mailed or faxed to the following named persons:

Conly J Schulte, Esq.
MONTEAU PEEBLES & CROWELL
12100 W Center Rd #202
Omaha, NE 68144-3960

Brandelle Gail Whitworth, Esq.
SHOSHONE-BANNOCK TRIBES
PO Box 306
Fort Hall, ID 83203

Scott Crowell, Esq.
1670 Tenth St W
Kirkland, WA 98033

Michael S Gilmore, Esq. 1-208-334-2830
OFFICE OF ATTORNEY GENERAL
Civil Litigation Division
PO Box 83720
Boise, ID 83720-0010

Jeremy Chin Chou, Esq.
OFFICE OF ATTORNEY GENERAL
Civil Litigation Division
PO Box 83720
Boise, ID 83720-0010

Clinton E Miner, Esq.
OFFICE OF ATTORNEY GENERAL
PO Box 83720
Boise, ID 83720-0010

_____ Chief Judge B. Lynn Winmill
_____ Judge Edward J. Lodge
_____ Chief Magistrate Judge Larry M. Boyle
_____ Magistrate Judge Mikel H. Williams

Visiting Judges:
_____ Judge David O. Carter

Judge John [illegible] Coughenour

Judge Thomas [illegible]. Zilly

Cameron S. Burke, Clerk

Date: 4-12-04

BY: _____
(Deputy Clerk)

Curt R. Thomsen, Esq., ISB #2072
T. Jason Wood, Esq., ISB #5016
THOMSEN STEPHENS LAW OFFICES, PLLC
2635 Channing Way
Idaho Falls ID 83404
Telephone (208)522-1230
Fax (208)522-1277

Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

WENDY KNOX, and RICHARD DOTSON, Plaintiffs, v. STATE OF IDAHO, ex rel. C. L. OTTER, Governor; BEN YSURA, Secretary of State; and LAWRENCE WASDEN, Attorney General, Defendants.	Case No. CV-2008-667 MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

COME NOW Plaintiffs, by and through counsel of record, and submit the following to the Court in response to the Defendants pending Motion to Dismiss.

INTRODUCTION

In November 2002, the citizens of Idaho passed an Initiative known as Proposition One, or the Tribal Gaming Initiative. The Initiative allowed "tribal video gaming machines" to be operated

on tribal reservations. Idaho Code § 67-429B describes what type of tribal video gaming machines are permitted. Idaho Code § 67-429C describes the process by which tribes may modify existing compacts to accept the terms of the Initiative. The Plaintiffs seek a judgment declaring that §§ 67-429B and 67-429C violate the gambling prohibition found in Article II, § 20 of the Idaho State Constitution.

The Defendants do not dispute that the plaintiffs have standing. Instead, they contend that the complaint should be dismissed under I.R.C.P. 12(b) mainly because of the contention that the tribes are necessary and indispensable parties to this action. Under Rule 19, if the absent party has an interest relating to the subject of the action, and their absence will, as a practical matter, impair or impede their ability to protect that interest, they are to be joined as a party if feasible. The State argues that because the tribes have an interest in their contracted for compact rights and the injury in fact alleged by the Plaintiffs cannot be redressed without the underlying tribal-state compacts being modified or otherwise partially invalidated, their ability to protect their interest will be impaired. However, the State asserts that because the tribes are immune from unconsented suits, they cannot be joined and are therefore indispensable, and according to the Defendants, the action must therefore be dismissed.

However, the tribes are not necessary or indispensable parties to this action. In their Amended Complaint the Plaintiffs do not request relief in the form of compelling the Defendants to take any specific action nor are they challenging or seeking to invalidate any tribal-state compact, but are merely seek a declaratory judgment.

The tribes are not parties and will not suffer direct prejudice from a declaratory judgment. If the tribes believe that their interest may be impaired then they have the ability to petition

this court to intervene under Rule 24. This would require the tribal authorities to participate in and consent to the adjudication before this Court. Whether to participate is a decision for the tribal authorities, but is not a consideration for this Court as related to a motion to dismiss under Rule 12. The Plaintiffs have obviously articulated a claim that will withstand a motion to dismiss under Rule 12(b); the facts of the amended complaint if taken as true as required under the Rule, show a direct claim ripe for adjudication. The Plaintiffs have clearly articulated the particularized injury necessary to have standing to seek the declaration asked for in this action. The State is obviously defending the statutes in this action, and is fully situated, capable, and able to so act to present full opposition to the Plaintiffs' assertions that the statues are unconstitutional under the Idaho Constitution.

STANDARD OF REVIEW

The standard for determining a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for reviewing a grant of summary judgment. *See Idaho Schs. For Equal Educ. v. Evans*, 123 Idaho 573, 578, 850 P.2d 724, 728 (1993); *Rim View Trout Co. v. Dep't. of Water Resources*, 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). The grant of a 12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. *See Moss v. Mid-American Fire and Marine Ins. Co.*, 103 Idaho 298, 302, 647 P.2d 754, 758 (1982); *Eliopulos v. Idaho State Bank*, 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct. App. 1996). When reviewing an order of the district court dismissing a case pursuant to I.R.C.P. 12(b)(6), the non-moving party is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. *See Idaho Schs. For Equal Educ.*, 123 Idaho at 578, 850 P.2d at 729; *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). "The issue is not whether the plaintiff

will ultimately prevail, but whether the party is entitled to offer evidence to support the claims." *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995).

ARGUMENT

In their supporting brief the Defendants have set forth for the Court the relevant law and background information regarding the Indian Gaming Regulatory Act and the Plaintiffs will not repeat it here. In their supporting brief, the Defendants argue that, under Rule 19, the tribes are necessary parties to this action and therefore must be joined. Because the tribes are immune from any unconsented suit, the State claims a mandated joinder of the tribes is not feasible, and therefore the matter must be dismissed.

While it is true that tribes are generally immune from unconsented suit and cannot be joined even if they are necessary parties, in the present case the tribes are not necessary or indispensable parties. Because the Plaintiffs are requesting a declaratory judgment, the standard found in I.C. § 10-1211 is the applicable standard for joinder of parties and materially affects the inquiry under Rule 19. Under the language of § 10-1211, the tribes are not necessary or indispensable parties. Additionally, even assuming for the purpose of argument only, that Rule 19 is the applicable standard, the tribes are still not necessary or indispensable parties.

I. THE DECLARATORY JUDGMENT ACT PROVIDES THE APPLICABLE STANDARD FOR NECESSARY PARTIES TO ACTIONS BROUGHT UNDER THE ACT.

The Plaintiffs seek a declaratory judgment that I.C. §§ 67-429B and 67-429C violate the Idaho State Constitution. Consequently, Idaho Code Title 10, Chapter 12, Declaratory Judgments, is the applicable statutory standard. I.C. § 10-1201, which authorizes the Court to issue declaratory judgments, states:

> Any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

The Plaintiffs' rights, status and legal relations are affected by the statutes listed above and therefore are permitted to bring this declaratory action. I.C. § 10-1211 describes the parties against whom a declaratory judgment action under the statute may be brought:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

Thus, the Act requires joinder only of parties "who have or claim any interest which *would* be affected by the declaration"; not those whose interests are merely uncertain or speculative. This action is directed at the State and the unconstitutional statutes enacted, and seeks only a declaration that the statutes are unconstitutional. The effects of such a declaration are not addressed by or a part of the Amended Complaint. The tribes' interest in their compact rights **are not effected as they are not parties and "no declaration shall prejudice the rights of persons not parties to the proceeding."**

Furthermore, the above statute, unlike Rule 19, ensures that this action "shall [not] prejudice the rights of persons not parties to the proceeding," such as Idaho Indian Tribes. Thus, by statute any Indian tribe's rights, including any rights under an IGRA compact with the State of Idaho, cannot be prejudiced if they are not joined. Consequently, even if such tribes were necessary parties, as a matter of Idaho Statute they are not "indispensable" within the meaning of Rule 19.

II. ASSUMING THAT I.R.C.P. 19 IS APPLICABLE, THE TRIBES ARE NOT NECESSARY OR INDISPENSABLE PARTIES.

Even if the Court were to ignore the plain language and effect of Idaho Code §10-1211, the tribes are still not necessary or indispensable parties.

A. The Cases Cited By The Defendants Are Inapplicable.

In their supporting brief, the Defendants rely on two cases regarding necessary and indispensable parties in support of their argument. These cases are clearly distinguishable from the present case. First, the defendants rely on *Wilbur v. Locke*, 423 F.3d 1105 (9th Cir. 2005). In *Wilbur* the plaintiffs sought to enjoin the implementation of a cigarette tax compact with a tribe. The Ninth Circuit found that the tribes were necessary parties because of the fundamental principle that a party to a contract is necessary and indispensable to litigation seeking to void the contract. The present case is distinguishable. Unlike in *Wilbur*, the Plaintiffs are not asking the Court to prevent the government or any other entity from forming a compact with a tribe nor are they attacking the compact entered into between the government and the tribe. The Plaintiffs Knox and Dotson simply seek a declaratory judgment that certain Idaho statutes are unconstitutional. Whether or not the State of Idaho chooses to abide by its tribal compacts if Plaintiffs are successful is not at issue here.

The same analysis and reasoning applies to the second case cited and heavily relied upon by the Defendants, *American Greyhound Racing, Inc. v. Hull*, 146 F. Supp 2d 1012 (D. Ariz. 2001). In *American Greyhound*, the plaintiffs challenged a statute which empowered the Arizona governor to negotiate new, or extend existing class III, gaming compacts with various tribes. The district court found that the statute embodied an unlawful delegation of legislative power and that various types of casino gaming were unlawful under Arizona law and enjoined the governor from engaging in

either action.

On appeal, the Ninth Circuit concluded that the tribes were necessary parties under Rule 19. The court found that the injunction ordered by the district court required the governor to terminate the present compacts and shut down virtually the entire Indian gaming industry in Arizona. In the present case, Plaintiffs are not seeking injunctive relief nor will a declaratory judgment require the termination of any particular compact or have the immediate effect of shutting down tribal gaming activity. They seek only a declaration that aforesaid gaming statutes are unconstitutional.

B. The Tribes Are Not Necessary Parties.

Applying the factors in I.R.C.P. 19, it is clear that the tribes are not necessary parties. Rule 19(a)(1) discusses joinder of persons if feasible. It states:

> A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

I.R.C.P. 19(a)(1).

In the present case, complete relief can be accorded among those already parties in the tribes absence. The Court's declaratory judgment would afford Plaintiffs everything they seek in their amended complaint, and a decision denying such a judgment would give the State of Idaho precisely what they seek by their motion, which is as "complete" as can be.

Plaintiffs simply seek a judgment declaring that I.C. §§ 67-429B and 67-429C are unconstitutional. The disposition of the instant action in the tribes' absence would not impair or

impede the tribes' ability to protect their interest in their IGRA compacts with the State of Idaho. Plaintiffs are not seeking injunctive or mandamus relief. They are not directly challenging, attacking, or seeking to rescind any tribal compact. No declaratory judgment would immediately endanger or threaten tribal compacts. The defendants' postulated threats all involve future action by the state authorities. Plaintiffs do not, in the Amended Complaint, seek any such relief, nor are the Plaintiffs empowered to do so. Plaintiffs are not the government authority. It is at best unclear whether the state of Idaho would be successful in a possible future attempt to avoid the tribal compacts if this Court grants Plaintiffs their requested declaratory judgment. However, if some authority other than Plaintiffs does take some action, the tribes would obviously have the full ability to protect their own interest in a court of law at that time and would not be prejudiced under the plain terms of the Declaratory Judgment Act.

In addition, the defendants who are already parties to the action would not be subject to a substantial risk of incurring, double, multiple, or otherwise inconsistent obligations. The defendants argue that any declaratory judgment by the Court that §§ 67-429B and 67-429C are unconstitutional would impose obligations on them which would conflict with the Ninth Circuit's judgment in *State of Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006) authorizing the tribes to add tribal video gaming machines to its IGRA sanctioned class III gaming compact. This creative interpretation of Rule 19 fails for several reasons. First, this Court lacks authority to impose any obligations inconsistent with the Ninth Circuit's decision cited above. The reason is that Plaintiffs have not requested that the Court impose any obligations at all on the defendants; the amended complaint seeks only declaratory relief, not mandatory relief. Another reason is that there is a serious question whether mandamus relief is even available, as Plaintiffs are unaware of any statute

or regulation imposing a clear, affirmative legal duty on the defendants to rescind gaming compacts with Indian tribes under circumstances like those present here. *Saviers v. Richey*, 96 Idaho 413, 415, 529 P.2d 1285, 1287 (1974) ("A Writ of Mandate will issue to a party who has a clear legal right to have an act performed if the officer against whom the writ is sought has a clear duty to act and if the act be ministerial and not require the exercise of discretion").

Second, contrary to the defendants' representations, the Ninth Circuit in the above case imposed no obligation at all upon the defendants. The court simply interpreted the existing compact between the State and the tribe as allowing the tribe certain gaming privileges given to other tribes without having to renegotiate their current compact. **The decision does not address the constitutionality of I.C. §§ 67-429B and 67-429C, nor was that an issue in the case.**

Third, the defendants' argument confuses Rule 19 with the doctrine of *res judicata*. In order to obtain the preclusive effect they seek from the Ninth Circuit's decision cited above, the defendants must establish all the elements required by the doctrine of claim preclusion or issue preclusion, which the defendants have not and cannot. *See A.R., Inc. v. Sheffer*, 134 Idaho 141, 144, 997 P.2d 602, 605 (2000) for a clear statement of the legal requirements necessary to obtain preclusive effect from a prior judgment under both doctrines. The effect of **prior** judgments on current proceedings is the subject of *Res judicata*; Rule 19 addresses the likelihood that a **future** judgments or obligations will conflict.

B. <u>Assuming the Tribes are Necessary Parties, They are Not Indispensable Parties.</u>

Assuming for the purposes of argument only that the tribes are necessary parties, under Rule 19(a)(2) the tribes are not indispensable parties. Rule 19(a)(2) states:

> Determination by court whenever joinder not feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

I.R.C.P. 19(a)(2).

After considering the factors listed above, the Court, in equity and good conscience, should determine to proceed with parties before it. With respect to the first factor, no party already involved in the instant case will suffer any prejudice if a judgment is entered in the absence of the tribes. As set forth above, pursuant to the language in I.C. § 10-1211, it is legally *impossible* for the tribes' rights to be prejudiced. A declaratory judgment entered in the tribes' absence will not preclude them from protecting their interest even if any future action is brought relating to such declaratory judgment. As a matter of law they still maintain the ability and right to defend their interests before a court of law, and are not bound as parties in this action.

The second factor under Rule 19(a)(1) discusses avenues by which the prejudice can be lessened or avoided. By simply asking for a declaratory judgment and not injunctive or mandamus relief, prejudice to tribal interests have been lessened and avoided. Unlike injunctive or mandamus relief, the tribes will suffer minimal or no direct prejudice because a declaratory judgment will not immediately or directly threaten the tribal compacts; it will not void any compact and the tribes still maintain the ability and right to protect any interest in their compacts in the future if the need arises.

As to the third factor, a declaratory judgment rendered in the tribes' absence clearly will be adequate. The Plaintiffs are not seeking any specific prohibition or mandatory action on the part of the tribes or government officials. Thus, a declaratory judgment finding that§§ 67-429B and 67-429C are unconstitutional will afford the Plaintiffs all the relief they seek.

The fourth factor weighs heavily in the Plaintiff's favor. If the tribes are considered indispensable parties, all the Plaintiffs' rights as Idaho citizens to seek a declaration are effectively closed off, if the tribes' consent is somehow required to adjudicate the matter of the statutes' constitutionality under Idaho law. In essence the State is arguing that the matter of Idaho's Constitution and its application to these statutes is not a matter for the Idaho Courts and is now exclusively in the hands of the tribes (an asserted separate non-Idaho nation) who must consent to adjudicate the matter. **This is absurd.** This Court has the full and unrestrained right and ability, indeed duty, to declare the constitutionality of Idaho statutes. *See Powers v. Canyon County*, 108 Idaho 967, 982,703 P.2d 1342, 1357 (1985) ("Under the Constitution, our courts have the authority to interpret legislation or to declare unconstitutional those legislative acts which do not meet the standards of the state or federal Constitutions."). This is a well-established and cherished principle of American jurisprudence since *See Marbury v. Madison*, 5 U.S. 137 (1803). A declaratory judgment by the Court declaring the statutes unconstitutional is the only remedy available to Plaintiffs. This Court cannot and should not eliminate that right.

Moreover, if the Court determines that the tribes are indispensable parties, it will have undesireable and absurd practical, policy, and constitutional implications. It will amount to a determination that the tribes' compact rights take precedence over the Idaho Constitution and strip the Idaho judiciary of its constitutional duty to determine the constitutionality of acts of the Idaho

Legislature. According to the defendants, Idaho statutes that violate the Idaho Constitution cannot be challenged in the Idaho Courts without the tribes' consent, and citizens of Idaho who have suffered particularized harm have no means of challenging the constitutionality of such statutes. Such a result would render the Idaho Constitution meaningless in this context. Constitutional rights and proscriptions that cannot be enforced might as well not exist.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny the defendants' Motion to Dismiss and proceed to adjudicate the matters on the merits as requested in the Amended Complaint.

DATED this 2 day of June, 2008.

THOMSEN STEPHENS LAW OFFICES, PLLC

By: _____ for

Curt R. Thomsen, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on June 2, 2008, I caused a true and correct copy of the foregoing to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon, by hand delivery, by transmitting by facsimile, or by placing said document in the attorney's courthouse box, as set forth below.

LAWRENCE G WASDEN
STEVEN L OLSEN
MICHAEL S GILMORE
CLAY R R SMITH
PO BOX 83720
BOISE ID 83720-0010

[X] U.S. Mail
[ ] Hand Delivery
[X] Facsimile

DAVID F HENSLEY
PO BOX 83720
BOISE ID 83720-0034

[X] U.S. Mail
[ ] Hand Delivery
[X] Facsimile

THOMSEN STEPHENS LAW OFFICES, PLLC

By: _____
Curt R. Thomsen

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Curt R. Thomsen, Esq., ISB #2072
T. Jason Wood, Esq., ISB #5016
THOMSEN STEPHENS LAW OFFICES, PLLC
2635 Channing Way
Idaho Falls ID 83404
Telephone (208)522-1230
Fax (208)522-1277

Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

WENDY KNOX, and RICHARD DOTSON, Plaintiffs, v. STATE OF IDAHO, ex rel. C. L. OTTER, Governor; BEN YSURA, Secretary of State; and LAWRENCE WASDEN, Attorney General, Defendants.	Case No. 2008-667 AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

COME NOW the Plaintiffs above-named, and for cause of action against the defendants, allege as follows:

1. The Plaintiffs in this action challenge the constitutionality of Idaho Code §§ 67-429B and 67-429C, enacted by Proposition One during the November 5, 2002, general election. Plaintiffs contend that Idaho Code §§ 67-429B and 67-429C violate the Idaho Constitution, Article III, § 20.

2. Plaintiffs Wendy Knox (hereinafter "Knox") and Richard Dotson (hereinafter "Dotson") are and at all times material were residents and citizens of the Bingham County, Idaho.

3. Defendant C. L. Otter, the Governor of the State of Idaho, is charged with upholding the Idaho Constitution and faithfully executing the laws of the State of Idaho, including Article III, § 20 of the Idaho Constitution and Idaho Code §§ 18-3808 and 18-3810. Mr. Otter is sued solely in his official capacity.

4. Defendant Ben Ysura, the Idaho Secretary of State, is charged with the administration of elections in Idaho pursuant to Title 34, Chapter 18, Idaho Code. His predecessor canvassed the voting on Proposition One and concluded that Proposition One received a majority of the votes at the November 5, 2002 election, resulting in Idaho Code §§ 67-429B and 67-429C. Mr. Ysura is sued solely in his official capacity.

5. Defendant Lawrence Wasden, Attorney General for the State of Idaho, is also charged with upholding the Idaho Constitution and faithfully executing and prosecuting the laws of the State of Idaho, including Article III, § 20 of the Idaho Constitution and Idaho Code §§ 18-3808 and 18-3810. Mr. Wasden is sued solely in his official capacity.

6. The Court has jurisdiction over this action pursuant to Idaho's Uniform Declaratory Judgment Act, Title 10, Chapter 12, Idaho Code, and Article V, § 20 of the Idaho Constitution.

7. Venue is proper pursuant to I.C. § 5-402(2) because this cause, or some part thereof, arose in Bingham County. Venue is also proper pursuant to I.C. § 5-404 because the State of Idaho is not a resident of any particular county in the State of Idaho.

8. Plaintiffs have standing to bring this action because they each have suffered injuries in fact, because there is a substantial likelihood that the judicial relief requested will prevent or redress their injuries, and because their injuries are different from those suffered by the general public, as established by the following facts, *inter alia*:

a. After enactment of Idaho Code §§ 67-429B and 67-429C and subsequent installation of slot machines at the Fort Hall Casino near Blackfoot, Idaho, both Plaintiffs became compulsive gamblers, driving the short distance from their homes to gamble on the slot machines (euphemistically called a "tribal video gaming machine") at the Fort Hall Casino, about 3 to 4 times per week.

b. Plaintiffs gambled almost exclusively at Fort Hall Casino because of its very short distance from their respective residences, compared to the next nearest places to gamble, hundreds of miles away.

c. Of all the different types of gambling available at the Fort Hall Casino, Plaintiffs played only the slot machines.

d. Because of Idaho Code §§ 67-429B and 67-429C and subsequent installation of slot machines at the Fort Hall Casino, Plaintiffs both developed clinical and devastating addictions to gambling at the Fort Hall Casino. Plaintiff Knox estimates her slot machine losses at Fort Hall Casino at about $50,000.00, and Plaintiff Dotson estimates his slot machine losses at Fort Hall Casino at about $30,000.00.

e. Because of the slot machines allowed at the Fort Hall Casino in violation of Idaho law and Idaho Constitution and their consequent gambling addiction, both plaintiffs suffered

not only large monetary losses, but also incurred additional debt they otherwise would not have incurred, were subjected to intrusive and humiliating collection efforts, stress, anxiety and marital and family strife, and tremendous emotional distress. Dotson lost his house and job, and was convicted of the crime of forgery in order to obtain gambling funds, all because of his gambling addiction precipitated by Proposition One, Idaho Code §§ 67-429B and 67-429C and subsequent installation of slot machines at the Fort Hall Casino.

g. Both Plaintiffs have sought, obtained, and continue to receive treatment for their destructive gambling addictions, through Gambler's Anonymous. Dotson has also obtained counseling from a private licensed counselor for his gambling addiction.

f. If the defendants had originally upheld the Idaho Constitution and statutes prohibiting slot machines against Proposition One and Idaho Code §§ 67-429B and 67-429C, slot machines would not have been installed at Fort Hall Casino and neither Plaintiff would have suffered the harm set forth above.

g. If this Court declares Proposition One and I.C. §§ 67-429B and 67-429C to be in violation of the Idaho Constitution, Fort Hall Casino may be forced to remove its slot machines, and such casino style gambling will be much less readily available to Plaintiffs. This will make their recovery much easier and will prevent or minimize further harm to the Plaintiffs of the kind set forth above.

9. Plaintiffs have no other plain, speedy and adequate remedy to halt the harm they are suffering, other than the remedies sought herein.

10. The constitutional issues raised in this proceeding concern Idaho State law only.

11. Article III, § 20 of the Idaho Constitution, as amended in 1992, expressly prohibits gambling in Idaho. It provides, *inter alia*:

> (1) ***Gambling is contrary to public policy and is strictly prohibited except for the following:***
>
> a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation; and
>
> b. Pari-mutuel betting if conducted in conformity with enabling legislation; and
>
> c. Bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.
>
> (2) No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, baccarat, keno and ***slot machines, or employs any electronic or electromechanical imitation or simulation of any form of casino gambling.***

(Emphasis added).

12. The Idaho Legislature has, by statute, likewise prohibited gambling, making it a crime, *see* I.C. § 18-3801 and 18-3802, and prohibited slot machines in particular. *See* I.C. § 18-3810.

13. Idaho Code §§ 67-429B and 67-429C purport to authorize gambling on Indian lands in Idaho in violation of Article III, § 20 of the Idaho Constitution.

14. The gambling activities ostensibly authorized by I.C. §§ 67-429B and 67-429C do not fall within any of the three exceptions in subsection (1) of Article II, Section 20, Idaho Constitution.

15. Idaho Code §§ 67-429B and 67-429C purport to authorize forms of casino gambling which subsection (2) of Article III, § 20 of the Idaho Constitution, expressly prohibits.

16. Idaho Code § 67-429B, enacted pursuant to Proposition One, purports to authorize the use of "tribal video gaming machines" on Indian lands.

17. The Attorney General's Certificate acknowledged that the tribal video gaming machines as defined by I.C. § 67-429B "would be construed as slot machines or imitations or simulations of forms of casino gambling."

18. Plaintiffs agree with the Attorney General's statement quoted above, and further allege that the aforesaid "tribal video gaming machines" are "electronic or electromechanical imitations or simulations of any form of casino gambling."

19. Idaho Code §§ 67-429C, enacted pursuant to Proposition One, authorizes the unilateral amendment of state-tribal gaming compacts between the State of Idaho and the various tribes, to incorporate and permit the illegal gambling purportedly authorized by I.C. § 67-429B, in violation of Article III, Section 20 of the Idaho Constitution.

20. Plaintiffs seek a judicial declaration that I.C. §§ 67-429B and 67-429C are unconstitutional and in violation of Article III, § 20 of the Idaho Constitution.

WHEREFORE Plaintiffs respectfully pray the judgment, order and decree from the Court declaring that Idaho Code §§ 67-429B and 67-429C are unconstitutional, unlawful, and invalid under the prohibition on gambling contained in Article III, § 20 of the Idaho Constitution;

DATED this 2nd day of June, 2008.

THOMSEN STEPHENS LAW OFFICES, PLLC

By: _____
T. Jason Wood, Esq.

J:\data\CRT\6085\PLEADINGS\003 Amended Complaint.wpd

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on June 2, 2008, I caused a true and correct copy of the foregoing to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon, by hand delivery, by transmitting by facsimile, or by placing said document in the attorney's courthouse box, as set forth below.

LAWRENCE G WASDEN
STEVEN L OLSEN
MICHAEL S GILMORE
CLAY R R SMITH
PO BOX 83720
BOISE ID 83720-0010

[X] U.S. Mail
[ ] Hand Delivery
[X] Facsimile

DAVID F HENSLEY
PO BOX 83720
BOISE ID 83720-0034

[X] U.S. Mail
[ ] Hand Delivery
[X] Facsimile

THOMSEN STEPHENS LAW OFFICES, PLLC

By: Curt R. Thomsen

J:\data\CRT\6085\PLEADINGS\003 Amended Complaint.wpd

LAWRENCE G. WASDEN
Attorney General

STEVEN OLSEN
Deputy Attorney General
Chief, Civil Litigation Division
MICHAEL S. GILMORE
ISB #1625; mike.gilmore@ag.idaho.gov
CLAY R. SMITH
ISB #6385; clay.smith@ag.idaho.gov
Deputy Attorneys General
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8072

DAVID F. HENSLEY
ISB # 6600; dhensley@gov.idaho.gov
Counsel to the Governor
Office of the Governor
P.O. Box 83720
Boise, Idaho 83720-0034
Telephone: (208) 334-2100
Facsimile: (208) 334-3454

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

WENDY KNOX, and RICHARD DOTSON, Plaintiffs, v. STATE OF IDAHO, ex rel. C. L. OTTER, Governor; BEN YSURSA, Secretary of State; and LAWRENCE WASDEN, Attorney General, Defendants.	Case No. CV-2008-667 REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Plaintiffs respond to the motion to dismiss in two ways. First, they filed an amended complaint. It is substantively identical to the original except for modifying the title from "Complaint for Declaratory and Other Relief" to "Amended Complaint for Declaratory Relief,"

substituting "may" for "shall" in paragraph 8.g, and deleting any requested relief other than a declaratory judgment "that Idaho Code §§ 67-429B and 67-429C are unconstitutional, unlawful, and invalid under the prohibition on gambling contained in Article III, § 20 of the Idaho Constitution." Second, plaintiffs argue in a memorandum opposing the motion that they "are not seeking injunctive relief nor will a declaratory judgment require the termination of any particular compact or have the immediate effect of shutting down tribal gaming activity" but, instead, that "[t]hey seek only a determination that [§§ 67-429B and -429C] are unconstitutional." Mem. in Opp'n to Defs.' Mot. to Dismiss ("Opp'n Mem.") at 7. They stress the limited nature of the relief sought throughout their memorandum. *E.g.*, *id.* at 2 ("[i]n their Amended Complaint the Plaintiffs do not request relief in the form of compelling the Defendants to take any specific action nor are they challenging or seeking to invalidate any tribal-state compact, but are merely seek [*sic*] a declaratory judgment"); *id.* at 6 ("Plaintiffs are not asking this Court to prevent the government or any other entity from forming a compact with a tribe nor are they attacking the compact entered into between the government and the tribe"); *id.* at 8 ("Plaintiffs are not seeking injunctive or mandamus relief. They are not directly challenging, attacking, or seeking to rescind any tribal compacts").

Plaintiffs' tactical maneuvering, which is aimed at attempting to negate the status of the several Idaho gaming tribes as indispensable parties under I.R.C.P. 19, places them in no more defensible position than before. The limited relief that they seek does not redress the injury-in-fact alleged in the amended complaint—the proximity of "slot machines" at the Fort Hall Casino to their residences—since a mere declaration of Tribal Gaming Initiative's constitutionality will not remove those machines. Plaintiffs thus advance, at most, a "generalized" and quite academic claim that a conflict exists between Article III, Section 20 and the Initiative. No justiciable

controversy exists under these circumstances. Plaintiffs' substitution of "may" for "will" in paragraph 8.g of the amended complaint and the attendant concession—"[i]t is *at best unclear* whether the state of Idaho would be successful in a *possible future* attempt to avoid the tribal compacts if this Court grants Plaintiffs their requested declaratory judgment" (Opp'n Mem. at 8; emphasis added)—vividly underscore their inability to satisfy the redressability prong of standing through the declaratory relief sought.

Even were standing present, however, plaintiffs' claim still would founder on Rule 19. The Uniform Declaratory Judgment Act, Idaho Code §§ 10-1201 to -1217, does not dilute that rule's requirements, and no legitimate question exists that Idaho tribes have an interest in the constitutionality of an initiative that was adopted to authorize a specific form of gaming in which only they could offer to the public. Four tribes, including the Shoshone-Bannock, have benefited from that authorization, and no doubt exists that plaintiffs have as an ultimate objective prejudicing their ability to continue such gaming. Their interest, together with plaintiffs' unvarnished hostility to it, leaves no doubt that the gaming tribes are necessary parties which, by virtue of immunity from suit, cannot be joined and should be deemed indispensable.[1]

REPLY ARGUMENT

I. PLAINTIFFS LACK STANDING TO MAINTAIN A CLAIM LIMITED TO A DETERMINATION CONCERNING THE TRIBAL GAMING INITIATIVE'S CONSTITUTIONALITY

The Idaho Supreme Court has held repeatedly that the Declaratory Judgment Act does not dispense with ordinary standing requirements. In the fountainhead decision concerning the

[1] Although the motion to dismiss was directed to the original complaint, plaintiffs respond with respect to the allegations in the amended complaint. Defendants believe that approach is appropriate for judicial efficiency purposes because the amendments do not alter in any significant manner the fundamental issues before this Court: the proper application of Rule 19 and the availability of relief that will redress plaintiffs' alleged injury-in-fact. The motion therefore should be deemed as addressed to the amended complaint insofar as it supersedes the original complaint. It is the understanding of defendants' counsel that plaintiffs concur in so proceeding.

standing doctrine generally, *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757 (1989)—which is discussed in the defendants' opening brief at pages 8 and 9—the Court also left no doubt that these general principles apply with full force to declaratory judgment actions, since the only relief requested there was declaratory in nature. *See* 116 Idaho at 637, 778 P.2d at 759 ("[t]he appellant . . . filed a declaratory judgment action on behalf of himself and all similarly situated Idaho Power ratepayers, seeking to have part of the implementing legislation declared unconstitutional"). Most recently, while observing that "the Declaratory Judgment Act provides authority for the courts to render declaratory judgments[,]" the Court cautioned that the Act "does not relieve a party from showing that it has standing to bring the action in the first instance." *Schneider v. Howe*, 142 Idaho 767, 772, 133 P.3d 1232, 1237 (2006). *Schneider* simply extended a long line of decisions adhering to *Miles* on this central proposition. *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 124-25, 15 P.3d 1129, 1132-34 (2000); *Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Batt*, 128 Idaho 831, 834, 919 P.2d 1032, 1035 (1996); *Selkirk-Priest Basin Ass'n, Inc. v. State ex rel. Andrus*, 127 Idaho 239, 245, 899 P.2d 949, 955 (1995); *see also Harris v. Cassia County*, 106 Idaho 513, 516, 691 P.2d 988, 991 (1984).

Plaintiffs ask this Court to ignore *Miles* and its progeny insofar as they seek declaratory relief that does not redress their alleged injury-in-fact. So, for example, even if they prevailed on their contention that Idaho Code §§ 67-429B and -429C are inconsistent with Article III, Section 20, plaintiffs would secure a determination of a *legal* issue but no effective *redress*; *i.e.*, the *legal* challenge advanced by plaintiffs is entirely academic because it does not provide any *relief* against the "casino style gambling" at the Fort Hall Casino that they contend is the source of their injury-in-fact. Am. Comp. ¶ 8.g. It is, again, the ready availability of such gaming, together with plaintiffs' alleged gambling addiction, that turns a "generalized grievance"—a

belief that the Tribal Gaming Initiative is unconstitutional—into a particularized injury-in-fact for standing purposes. *See Lance v. Coffman*, 127 S. Ct. 1194, 1196 (2007) ("Article III of the [United States] Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.' One component of the case-or-controversy requirement is standing, which requires a plaintiff to demonstrate the now-familiar elements of injury in fact, causation, and redressability. . . . We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy"). Plaintiffs must seek relief that will redress this particularized injury to establish standing.

The *Miles* Court additionally made clear that the redressability prong of the standing doctrine cannot be satisfied by speculation or hope. Rather, "litigants generally must allege or demonstrate an injury in fact and a *substantial likelihood* that the judicial relief requested will prevent or redress the claimed injury." 116 Idaho at 641, 778 P.2d at 763 (emphasis added) (citing *Duke Power Co. v. Carolina Envt'l Study Group*, 438 U.S. 59, 79 (1978)); *accord Troutner v. Kempthorne*, 142 Idaho 389, 331, 126 P.3d 926, 928 (2006); *Noh v. Cenarrusa*, 137 Idaho 798, 800, 53 P.3d 1217, 1219 (2002); *Phinney v. Shoshone Med. Ctr.*, 131 Idaho 529, 532, 960 P.2d 1258, 1261 (1998). Here, however, the four tribes offer video gaming machine activity pursuant to a federal law-sanctioned compact and will not be bound by any determination concerning the constitutionality of §§ 67-429B and -429C. Plaintiffs properly do not suggest, therefore, that the declaratory relief itself, if granted, will require the Shoshone-Bannock Tribes to cease such gaming activity at the Fort Hall Casino. They also do not suggest that the requested declaratory relief will have as its *likely* consequence, through some chain of events

independent of this litigation, the Shoshone-Bannock Tribes' being required to terminate video machine gaming. Indeed, the amended complaint meekly suggests that, through the Tribal Gaming Initiative's invalidation, the Tribes "*may* be forced to remove [their] slot machines" (Am. Comp. ¶ 8.g (emphasis added))—a material change from the original complaint's allegation that the Tribes "*will* be forced to remove [their] slots machines" (Comp. ¶ 8.g (emphasis added)). The opposition memorandum, as discussed above, is no less equivocal on this point, admitting that "at best" it is "unclear" whether a "possible future attempt" to void the tribal-state compacts would be "successful." Opp'n Mem. at 8; *see also id.* at 8-9 (mandamus relief is not sought because "Plaintiffs are unaware of any statute or regulation imposing a clear, affirmative legal duty on the defendants to rescind gaming compacts . . . under the circumstances like those present here"). Given the claim preclusion attendant to the Ninth Circuit's judgment in *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006), plaintiffs' equivocation is amply justified.[2]

Plaintiffs, in sum, have first pled and then argued themselves out of court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568 (1992) ("The most obvious problem in the present case is redressability. Since the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary: He could be ordered to revise his regulation to require consultation for foreign projects. But this would not remedy respondents' alleged injury unless the funding agencies were bound by the Secretary's regulation, which is very much an open question").

[2] Plaintiffs contend that defendants' *res judicata* analysis improperly expands the Ninth Circuit's decision because the constitutionality of the Tribal Gaming Initiative was not litigated. Opp'n Mem. at 9. Their criticism fails to recognize that part and parcel of claim preclusion under federal common law is the binding quality of a judgment as to any claim that *could* have been raised in the proceeding. *E.g.*, *Rivet v. Regions Bank*, 522 U.S. 470, 476 (1998). Idaho, had it been deemed appropriate, could have questioned the consistency of §§ 67-429B and -429C with Article III, Section 20 in the *Shoshone-Bannock Tribes* litigation.

II. THE IDAHO GAMING TRIBES ARE NECESSARY AND INDISPENSABLE PARTIES

Plaintiffs devote much of the opposition memorandum to the Idaho gaming tribes' status as necessary and indispensable parties under I.R.C.P. 19. They begin by positing that the Declaratory Judgment Act provides a more lax standard for determining such status than Rule 19. Opp'n Mem. at 4-5. They spend the remainder of the memorandum distinguishing the authority relied upon by defendants in their opening brief and arguing that the tribes are neither necessary nor indispensable parties. *Id.* at 6-12. Given the absence of a justiciable controversy, the Rule 19 issue neither need nor should be addressed. *See, e.g., Steel Co. v. Citizens for Better Envt.*, 523 U.S. 83, 94-95 (1998) (Article III justiciablity issues must be resolved as a threshold matter). The Rule 19 issues nevertheless are addressed in the event that this Court finds subject matter jurisdiction.

First, plaintiffs marshal no decisional or other support for their contention that the Declaratory Judgment Act, through Idaho Code § 10-1211, supplies the appropriate necessary-and-indispensable party standard. Section 10-1211 provides in part that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings." This language was part of the Act as adopted in 1933. *See* 1933 Idaho Sess. Laws ch. 70, § 11. The Supreme Court subsequently promulgated the Idaho Rules of Civil Procedure, including I.R.C.P. 57 which specifically governs declaratory judgments and whose opening sentence states "[t]he procedure for obtaining a declaratory judgment pursuant to the statutes of this state[] shall be in accordance with these rules." Rule 19 therefore controls the question whether the Idaho gaming tribes are necessary and indispensable parties. The comparably worded Fed. R. Civ. P. 57 has been so applied. *See generally* 10B Charles Alan

Wright *et al.*, *Federal Practice and Procedure* § 2768, at 664-65 (3d ed. 1998) ("the requirements of compulsory joinder of those needed for a just adjudication set out in Rule are fully applicable" to actions seeking declaratory relief).

Second, plaintiffs' Rule 19 necessary-party analysis pivots off a single, and often-stated, rationale: The amended complaint seeks no relief that will affect Idaho gaming tribes' compact rights. Plaintiffs nonetheless *do seek a determination* that the Tribal Gaming Initiative is unconstitutional, and no dispute exists that the Initiative laid the foundation for the compact rights now enjoyed by the tribes. Even if that determination would have no *practical* effect—and on this score defendants agree with plaintiffs—the tribes have a substantial economic and legal stake in the validity of contractual undertakings with the State and a corresponding interest in protecting that stake against any claim intended to cast a shadow over the propriety of compact-authorized gaming. They, no less than other entities engaged in complex commercial and governmental activities, cannot predict with certainty the eventual impact of a declaration that §§ 67-429B and -429C are unconstitutional could have on their gaming enterprises. The tribes, in short, have a concrete and important interest in any claim that suggests, directly or indirectly, that they are engaging in gaming activity not permitted under state law.

Third, plaintiffs dispute each of Rule 19(a)(2) indispensable-party considerations. Their assertion that "it is legally *impossible* for the tribes' rights to be prejudiced" (Opp'n Mem. at 10)—the first consideration—is no more persuasive with respect to indispensable party status than to necessary party status. The suggestion that no remedial "shaping" is required given the limited relief sought simply re-packages the lack-of-interest theory advanced by plaintiffs. Conversely, a declaratory judgment that is not binding on the tribes serves no practical end; it is a mere academic exercise. Lastly, defendants realize—and acknowledged in their opening

brief—that dismissal of the complaint on indispensable party grounds will leave plaintiffs with no forum to litigate their constitutional challenge to the Tribal Gaming Initiative. The absence of such ability means only that plaintiffs *must* look elsewhere for relief against any discrete prejudice they suffer from the operation of the Fort Hall Casino. No Idaho citizen, however, has the ability to challenge the Initiative simply because of a perceived inconsistency with Article III, Section 20. To the extent plaintiffs maintain just such a challenge—and they do so by virtue of the limited relief sought and its failure to redress the purported injury-in-fact—any claim of prejudice cannot be given significant weight under Rule 19(a)(2)'s fourth consideration.

CONCLUSION

Defendants' motion to dismiss should be granted.

DATED this 5th day of June 2008.

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

STEVEN OLSON
Deputy Attorney General
Chief, Civil Litigation Division

MICHAEL S. GILMORE
Deputy Attorney General
Civil Litigation Division

DAVID F. HENSLEY
Counsel to the Governor
Office of the Governor

By: _____
CLAY R. SMITH
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on the 5th day of June 2008 I caused to be served a true and correct copy of the foregoing upon the following party by the method listed below:

CURT R. THOMSEN, ESQ.
T. JASON WOOD, ESQ.
THOMSEN STEPHENS LAW OFFICES, PLLC
2635 CHANNING WAY
IDAHO FALLS ID 83404

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- X Federal Express
- X Facsimile: 208-522-1277
- ☐ Statehouse Mail

CLAY R. SMITH

LAWRENCE G. WASDEN
Attorney General

STEVEN OLSEN
Deputy Attorney General
Chief, Civil Litigation Division
MICHAEL S. GILMORE
ISB #1625; mike.gilmore@ag.idaho.gov
CLAY R. SMITH
ISB #6385; clay.smith@ag.idaho.gov
Deputy Attorneys General
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8072

DAVID F. HENSLEY
ISB # 6600; dhensley@gov.idaho.gov
Counsel to the Governor
Office of the Governor
P.O. Box 83720
Boise, Idaho 83720-0034
Telephone: (208) 334-2100
Facsimile: (208) 334-3454

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

WENDY KNOX, and RICHARD DOTSON, Plaintiffs, v. STATE OF IDAHO, ex rel. C. L. OTTER, Governor; BEN YSURSA, Secretary of State; and LAWRENCE WASDEN, Attorney General, Defendants.	Case No. CV-2008-667 ERRATUM

Defendants respectfully notify the Court and counsel that the sentence on page 4 of the Reply Brief in Support of Defendants' Motion to Dismiss beginning with "Most recently" inadvertently deleted the word "not" from the quoted portion of *Schneider v. Howe*, 142 Idaho 767, 133 P.3d 1232 (2006). The sentence should read: Most recently, while observing that "the

Declaratory Judgment Act provides authority for the courts to render declaratory judgments[,]" the Court cautioned that the Act "does *not* relieve a party from showing that it has standing to bring the action in the first instance" (emphasis added to reflect omission).

DATED this 5th day of June 2008.

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

STEVEN OLSON
Deputy Attorney General
Chief, Civil Litigation Division

MICHAEL S. GILMORE
Deputy Attorney General
Civil Litigation Division

DAVID F. HENSLEY
Counsel to the Governor
Office of the Governor

By: _____
CLAY R. SMITH
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on the 5th day of June 2008 I caused to be served a true and correct copy of the foregoing upon the following party by the method listed below:

CURT R. THOMSEN, ESQ. T. JASON WOOD, ESQ. THOMSEN STEPHENS LAW OFFICES, PLLC 2635 CHANNING WAY IDAHO FALLS ID 83404	X U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Federal Express X Facsimile: 208-522-1277 ☐ Statehouse Mail

CLAY R. SMITH

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

WENDY KNOX and RICHARD DOTSON,

Plaintiffs,

-vs-

STATE OF IDAHO, *el rel* C.L. OTTER, Governor; BEN YSURA, Secretary of State; and LAWRENCE WASDEN, Attorney General,

Defendants.

Case No. CV-2008-667

MINUTE ENTRY

This matter came before the Court the 6th day of June 2008.

Mr. T. Jason Wood, Esq., appeared telephonically on behalf of the plaintiffs. Mr. Mr. Clay Smith, Esq., appeared telephonically on behalf of the defendants.

Counsel informed the Deputy Court Clerk that the parties had stipulated to vacate the June 9, 2008 hearing on Defendants' Motion to Dismiss.

Mr. Smith shall file a notice to vacate with the Court, and the matter will be reset for hearing at a later date.

DATED this 9th day of June 2008.

DARREN B. SIMPSON
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a full, true and correct copy of the foregoing document was delivered by first-class mail, facsimile or designated box this 9 day of June 2008, to the following:

T. JASON WOOD, ESQ.
2635 CHANNING WAY
IDAHO FALLS, ID 83404

☑ U.S. Mail ☐ Courthouse Box ☐ Facsimile

CLAY R. SMITH, ESQ.
DEPUTY ATTORNEY GENERAL
PO BOX 83720
BOISE, ID 83720-0010

☑ U.S. Mail ☐ Courthouse Box ☐ Facsimile

SARA STAUB, Clerk of the Court

Deputy Clerk

ORIGINAL

CV 08-667
MP

Curt R. Thomsen, Esq., ISB #2072
T. Jason Wood, Esq., ISB #5016
THOMSEN STEPHENS LAW OFFICES, PLLC
2635 Channing Way
Idaho Falls ID 83404
Telephone (208)522-1230
Fax (208)522-1277

Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

WENDY KNOX, and RICHARD DOTSON, Plaintiffs, v. STATE OF IDAHO, ex rel. C. L. OTTER, Governor; BEN YSURA, Secretary of State; and LAWRENCE WASDEN, Attorney General, Defendants.	Case No. CV-2008-667 SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

COME NOW Plaintiffs, by and through counsel of record, and with the stipulation of defense counsel, and submit the following supplemental points and authorities in opposition to the Defendants' Motion to Dismiss, and particularly in response to the Defendants' Reply Brief.

INTRODUCTION AND SUMMARY

Defendants have filed a Reply Brief in Support of Defendants' Motion to Dismiss in which they argue for the first time that Plaintiffs lack standing to seek a declaration of the constitutionality of I.C. §§ 67-429B and -429C because the relief requested by Plaintiffs does not redress an injury-in-fact. Defendants also again argue that the absent tribes are necessary parties. These arguments are without merit. The prior history of the unconstitutional initiative as related to the State precludes the defendants from asserting a lack of standing or justiciable controversy defense. There is also a substantial likelihood that the relief requested will redress plaintiffs' injuries as the Defendants have a positive duty to uphold and enforce the Idaho Constitution as part of their oath of office and constitutional responsibilities. The tribes are not necessary parties as their interest are not directly affected. They are not indispensable because Rule 19 cannot be applied to bar the Court from discharging its duty to interpret the Idaho Constitution, and because Plaintiffs seek to vindicate public rights. Finally, the statutes in question are palpably unconstitutional, a fact acknowledged by the Defendants in prior dealings with the initiative, and therefore the tribes have no "interest" recognized by Rule 19.

ARGUMENT

I. PLAINTIFFS HAVE STANDING.

Plaintiffs seek a declaratory judgment finding that I.C. §§ 67-429B and -429C are unconstitutional. The Defendants contend for the first time in their reply brief that Plaintiffs lack standing to maintain a claim limited to determining the constitutionality of I.C. §§ 67-429B and -429C. The Defendants do not argue that Plaintiffs lack particularized interests and a direct, concrete injury-in-fact which sets them apart from the general public, and they apparently concede that

Plaintiffs would have standing to bring this action from that perspective. Defendants simply contend that even though the Plaintiffs have suffered a concrete, particularized injury, this action will not redress the issues raised and Plaintiffs should not be allowed to proceed, in essence because there is no controversy which can be adjudicated by these Plaintiffs. The issue is thus not really one of standing, it is a question of justiciability .

A. **Past Litigation Precludes Defendants from Asserting a Lack of Standing Defense**.

A prerequisite to a declaratory judgment action is an actual or justiciable controversy. *Harris v. Cassia County,* 106 Idaho 513, 681 P.2d 988 (1984). Justiciability is generally divided into subcategories -- advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions. *Miles v. Idaho Power Co.,* 116 Idaho 635, 639 (1989). Defendants' standing argument is, in essence, an argument that this case lacks a justiciable controversy. However, the Idaho Supreme Court has found otherwise.

Noh v. Cenarrusa, (in Re Action to Determine Constitutionality of the Indian Gaming Initiative), Proposition One, 137 Idaho 798 (2002), is the first case in which the Idaho Supreme Court first faced the constitutional challenge to the initiative that would create I.C. §§ 67-429B and -429C. The State was the named defendant and raised defenses of lack of standing, ripeness and justiciability – the very same defenses they raise here. In *Noh* the petitioners initiated their claim directly in the Idaho Supreme Court, seeking to have the Indian Gaming Initiative declared unconstitutional on the same grounds as asserted in the instant case. The Court found no controversy existed because petitioners did not meet traditional standing and ripeness requirements. The petitioners did not allege a current particularized injury in fact such as those alleged by Plaintiffs

Knox and Dotson. Instead they alleged only a possible generalized future injury. *Id* at 800. The Court further concluded that the case was not then ripe because "there [was] not a real controversy at this point because Proposition One is simply a proposal . . . If Proposition One does not pass, there will not be a need for an adjudication as to its validity." *Id* at 800. The Court concluded by stating that "This is a statewide initiative on a subject in serious controversy . . . ***If the initiative passes there will most certainly be a justiciable controversy.***" *Id* at 803 (emphasis added).

Clearly the initiative passed and was codified. However, unlike *Noh,* Plaintiffs Knox and Dotson case have alleged a particularized and direct injury in fact from the initiative statutes. The harm to Plaintiffs is not a possible future harm, but has already occurred and will continue to occur without the relief they have requested. Thus, a present controversy and need to adjudicate the constitutionality of I.C. §§ 67-429B and -429C exists. Plaintiffs have therefore passed the standing and ripeness tests and, as unequivocally stated by the Idaho Supreme Court, there is most certainly a justiciable controversy.

Defendants are collaterally estopped from asserting a lack of standing or justiciable controversy defense by *Noh.* Collateral estoppel may be applied to prior judgments, estopping a person from disputing a finding or verdict that has already been rendered. *Navarro v. Yonkers,* 173 P.3d 1141, 1144 (Idaho 2007). The tests of when collateral estoppel should apply are: (1) whether the party had a full and fair opportunity to litigate the issue; (2) whether the issue decided in the previous litigation is identical to the current issue presented; (3) whether the issue was actually decided in the previous litigation and whether the issue was necessary to the prior judgment; (4) whether the final judgment was on the merits; and (5) whether the party against whom the prior judgment is asserted was a party or in privity with those subject to the prior judgment. *Id.*

In *Noh*, defendants had a full and fair opportunity to litigate the justiciable controversy and standing issues, and did so. Whether a justiciable controversy existed was a necessary issue to the suit and was clearly decided in *Noh*; the lack of standing and ripeness was the sole reason the action was dismissed. Defendants have already addressed and lost on the issue of justiciability. There was no claim by the State that the tribes were necessary or indispensable parties in the *Noh* case.

B. Plaintiffs' Requested Relief will Redress Their Injury-In-Fact.

The Defendants contend that Plaintiffs requested relief "would secure a determination of a legal issue but no effective redress . . . [that] the legal challenge advanced by plaintiffs is entirely academic because it does not provide any relief against 'casino style gambling' . . . that they contend is the source of their injury-in-fact." *See* Def. Reply Brief, p. 4. In order to satisfy the case or controversy requirement of standing, litigants generally must allege or demonstrate an injury in fact and a *substantial likelihood* that the judicial relief requested will prevent or redress the claimed injury. *Miles v. Idaho Power Co.,* 116 Idaho 635, 641 (1989) (emphasis added).

In this case, although not an absolute certainty, there is a *substantial likelihood* that the relief request by the Plaintiffs will redress their injury. A statute declared unconstitutional confers no rights, creates no liability, and affords no protection – it is void (subject to certain exceptions not applicable here). *Smith v. Costello*, 77 Idaho 205, 209, 290 P.2d 742, 744 (1955); *State v. Garden City*, 74 Idaho 513, 524, 265 P.2d 328, 333 (1953); *Valente v. Mills*, 93 Idaho 212, 215, 458 P.2d 84, 87 (1969). Defendants **have each sworn to uphold and enforce the Idaho State Constitution when they took office.** If the Court were to find that I.C. §§ 67-429B and -429C violate the Idaho Constitution, the Defendants would have no authority or ability to enforce or effectuate the void statutes, and they would be duty-bound to enforce the Court's constitutional declaration. It is highly

doubtful, if not absolutely certain, that the Defendants would refuse to uphold and enforce the Constitution in violation of the law and their oaths of office. A declaration by the Court that the statutes are unconstitutional is therefore substantially likely to redress Plaintiffs' injuries.

II. THE TRIBES ARE NEITHER NECESSARY NOR INDISPENSABLE PARTIES.

A. The Tribes Not Necessary Parties Under Rule 19.

The Defendants alternatively argue that if there is a substantial likelihood of redressing Plaintiffs' concrete injury–in-fact, then the tribes are necessary and indispensable parties under I.R.C.P. 19, and because the tribes have sovereign immunity and cannot be joined, this case must be dismissed. The Defendants thereby attempt to throw Plaintiffs and the Court on the horns of a dilemma, making it literally impossible for the Court to address the constitutionality of the Indian gaming statues *under **any** circumstances.* The defendants' efforts to bar the courthouse to any and all lawful plaintiffs seeking redress for the unconstitutionality of the Idaho Indian gaming statutes must necessarily fail.

1. As a practical matter this action will not impair the absent Tribes' ability to protect their interests.

The Idaho tribes are not necessary parties under the first prong of Rule (19)(a)(1), which requires joinder of a party if "(1) in the person's absence complete relief cannot be accorded among those already parties." The tribes are not necessary parties because if I.C. §§ 67-429B and -429C were declared unconstitutional by the Court, Plaintiffs would receive all the relief for which they have prayed. The tribes are not necessary in order for the Court to declare the statutes unconstitutional.

Neither are the tribes necessary under the second part of I.R.C.P. 19(a)(1), which requires joinder of a party if "(2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest." As noted in Plaintiffs' initial *Brief in Opposition*, the amended complaint seeks no relief that will affect any tribal gaming rights. A declaration by the Court that I.C. §§ 67-429B and -429C are unconstitutional will have no direct effect on any tribes' ability to protect their interest. The viability of the tribes' compacts with the State of Idaho is an entirely separate issue to which Plaintiffs Knox and Dotson are not parties.

The Defendants admit in their reply brief that a determination of unconstitutionality by the Court would have no practical effect on the tribes' ability to protect their interest. *See* Def. Reply Brief at 8 ("even if that determination would have no *practical* effect - and on this score defendants agree with plaintiffs . . ."). Defendants then proceed to argue that despite there being no practical effect, "the tribes have a substantial economic and legal stake in the validity of contractual undertakings with the State and a corresponding interest in protecting that stake against any claim intended to cast a shadow over the propriety of compact-authorized gaming" and they "cannot predict with certainty the eventual impact of a declaration that §§ 67-429B and -429C are unconstitutional could have on their gaming enterprises." Therefore, as stated by Defendants, the tribes at most only "have a concrete and important interest in any claim that suggests . . . they are engaging in gaming activity not permitted under state law." Def. Reply Brief at 8.

While the tribes may have a "concrete and important interest" and may not be able to predict the effect a finding that I.C. §§ 67-429B and -429C are unconstitutional will have on their gaming activities, this is not sufficient to satisfy the rule and make the tribes necessary parties. Rule19(a)(1)

requires that, *as a practical matter,* the ability to protect this interest not be impaired or impeded. As plaintiffs argued in their Brief in Opposition **and as agreed by defendants**, any determination of unconstitutionality will not, *as a practical matter*, impair or impede the tribes' ability to protect their interests. As a result, the tribes are not necessary parties under I.R.C.P. 19(a)(1), and therefore need not be joined.

2. *The absent tribes have no interest recognized by Rule 19 because I.C. §§ 67-429b and -429c which created the interest are palpably unconstitutional.*

The tribes are not necessary parties because they have no protectable interest in a compact that is based upon an obviously unconstitutional statute. The Defendants postulate that the tribes have a protectable interest within the meaning of Rule 19 in their gaming compacts, which in turn derive from I.C. §§ 67-429B and C. However, such an interest based upon the clearly unconstitutional Indian gaming statutes is not the type of interest qualified for protection under Rule 19. The Ninth Circuit Court of Appeals discussed interests based on palpably unconstitutional statutes in *Shermoen v. United States,* 982 F.2d 1312 (9th Cir. 1992). *Shermoen* involved 70 individual Native Americans and a community of Yurok Indians who sought review of a judgment from the United States District Court for the Northern District of California, which dismissed their suit seeking injunctive relief and a declaration that the Hoopa-Yurok Settlement Act, violated their constitutional rights, because the Hoopa Valley and Yurok tribes were necessary and indispensable parties pursuant to Rule 19. The Ninth Circuit stated:

> We do not hold, of course, that a district court would be required to find a party necessary based on patently frivolous claims made by that party. But such is clearly not the case before us; the absent tribes have an indisputable interest in the outcome of appellants' suit, and the Act, which has created that interest, is not so palpably unconstitutional that we could readily say the absent tribes' claims are fatuous.

Id at 1318 . *See also Andree v. Ashland County,* 818 F.2d 1306, 1313 (7th Cir. 1987). Because the Act at issue was not nearly so obviously in violation of the Constitution as the statutes at issue in the instant case, the Ninth Circuit found the tribe had a protectable interest under Rule 19.

In contrast, the interest of the tribes in the present case as postulated by the Defendants derives from I.C. §§ 67-429B and -429C which are in fact palpably unconstitutional, a fact admitted and certified by the Idaho Attorney General. Idaho Code §§ 67-429B and 67-429C purport to authorize forms of casino gambling on Indian lands in Idaho. Specifically, Idaho Code § 67-429B purports to authorize the use of "tribal video gaming machines" on Indian lands. However, Article III, § 20 of the Idaho Constitution, as amended in 1992, expressly prohibits gambling in Idaho. It provides, *inter alia*:

> (1) ***Gambling is contrary to public policy and is strictly prohibited except for the following***:
>
> a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation; and
>
> b. Pari-mutual betting if conducted in conformity with enabling legislation; and
>
> c. Bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.
>
> (2) No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, baccarat, keno and ***slot machines, or employs any electronic or electromechanical imitation or simulation of <u>any form</u> of casino gambling***.

(Emphasis added).

The Idaho legislature has, by statute, likewise prohibited gambling, making it a crime (*see I.C. §§ 18-3801 and 18-3802*), and prohibited slot machines in particular. *See* I.C. § 18-3810. The gambling activities ostensibly authorized by I.C. §§ 67-429B and 67-429C do not fall within any of the three exceptions in subsection (1) of Article II, Section 20, of the Idaho Constitution and which subsection (2) of Article III, § 20 of the Idaho Constitution, expressly prohibits. For these reasons, the Defendants have admitted that the tribal video gaming machines as defined in I.C. § 67-429B "would be construed as slot machines or imitations or simulations of forms of casino gambling," that "in light of Idaho's blanket restriction on the use or possession of slot machines, it is unlikely that attempts to distinguish Tribal Video Gaming Machines from slot machines or imitations thereof under Idaho law will succeed" and "the argument that such a gaming statute or initiative is permissible ***cannot*** be premised upon an assumption that such gaming is permitted by the Idaho Constitution." *See* Attached - Attorney General's Certificate of Review: Proposed Initiative Regarding Tribal Video Machine Gaming (emphasis added).

In this case, the asserted tribal interests stemming from I.C. §§ 67-429B and -429C are based solely on palpably unconstitutional statutes. The very existence of the asserted absent tribes' interest depends on the legality and presumed constitutionality of these plainly unconstitutional statutes. As such, any claims of the absent tribes asserted by the Defendants are frivolous, fatuous and inconsequential; therefore, this Court is not required to find that the tribes are necessary parties.

B. <u>The Tribes Are Not Indispensable Under Rule 19</u>.

Analysis under I.R.C.P. 19(a)(2) is required only if a party is necessary under Rule 19(a)(1). Because the tribes are not necessary parties under Rule 19(a)(1), any analysis under Rule 19(a)(2) as to whether the tribes are indispensable is not required. However, assuming *arguendo* that the

tribes are necessary under Rule 19(a)(1), they clearly are not indispensable within the meaning of Rule 19(a)(2). The tribes are not parties and will not suffer direct prejudice from a declaratory judgment and indeed they are protected from such prejudice by I.C. § 10-1211 ("no declaration shall prejudice the rights of persons not parties to the proceeding. "). **If the tribes believe that their interest may be impaired then they have the ability to petition this court to intervene under Rule 24.** This would require the tribal authorities to participate in and consent to the adjudication before this Court. Whether to participate is a decision for the tribal authorities, but their deliberate unwillingness to participate is not a consideration for this Court as related to a motion to dismiss under Rule 19.

1. The Tribes' voluntary absence does not render them indispensable under Rule 19 nor does it relieve the Court of its duty to interpret the Constitution.

The cases cited by the defendants on Rule 19 are fatally distinguishable. They lack facially unconstitutional statutes upon which the tribes' interest is based, lack plaintiffs who advance truly public rights, and/or involve prayers for relief directly requesting that the tribal compacts be nullified. On the other hand, *Saratoga County Chamber of Commerce, Inc v. Pataki,* 798 N.E.2d 1047 (N.Y. 2003) is directly on point. In that case the plaintiffs, citizens and legislators opposed to casino gambling, alleged that a compact between the Governor and the St. Regis Mohawk Tribe allowing electronic class III gaming violated the New York constitutional ban on gambling. Initially, the trial court dismissed the case for plaintiffs' failure to join the tribe as an indispensable party. However, the Appellate Division reversed the trial court, holding that the tribes were not indispensable, and remanded the case for proceedings on the merits. The trial court subsequently granted summary judgment to plaintiffs, declaring the gaming compact unconstitutional, and

defendants appealed the decision, arguing the case should have been dismissed for failure to join the Indian tribe as a necessary and indispensable party. The Court disagreed:

> The Tribe is not a party to this action. Although its interests are certainly affected by this litigation, the Tribe has chosen not to participate. Unless Congress provides otherwise, Indian tribes possess sovereign immunity against the judicial processes of states. [citations omitted]. As a result, New York courts cannot force the Tribe to participate in this lawsuit. The State claims that the Tribe's absence requires us to dismiss this action. We disagree.

Id at 1057.

The Court went on to discuss the rules governing joinder of necessary and indispensable parties under New York's Civil Practice Law and Rules (CPLR). CPLR 1001(b) is similar to Rule 19(a)(2), setting forth nearly identical factors for the court to consider when deciding whether to dismiss an action where "jurisdiction over [the necessary party] can be obtained only by his consent or appearance." CPLR 1001(b) states these considerations in relevant part:

> 1. Whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
>
> 2. The prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
>
> 3. Whether and by whom prejudice might have been avoided or may in the future be avoided;
>
> 4. The feasibility of a protective provision by order of the court or in the judgment; and
>
> 5. Whether an effective judgment may be rendered in the absence of the person who is not joined.

NY CPLR 1001(b); *Id* at 1058.

Like the instant case, the defendants in *Pataki* "relie[d] principally on paragraph (2), and argue[d] that the prejudice to the Tribe caused by a judgment eviscerating the authority under which it operates the casino should be sufficient to dismiss the action. In contrast, plaintiffs rely on paragraph (1), arguing that there can be no remedy for the alleged constitutional violation if the Tribe's absence requires dismissal." The Court concluded that "Plaintiffs' arguments are on firmer ground," and explained:

> **Not only will these plaintiffs be stripped of a remedy if we hold that the Tribe is an indispensable party, but no member of the public will ever be able to bring this constitutional challenge. In effect, the Executive could sign agreements with any entity beyond the jurisdiction of the Court, free of constitutional interdiction. The Executive's actions would thus be insulated from review, a prospect antithetical to our system of checks and balances.**
>
> There are two principal purposes of requiring dismissal owing to the absence of an indispensable party. First, mandatory joinder prevents multiple, inconsistent judgments relating to the same controversy. Second, joinder protects the otherwise absent parties who would be "embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard". [citations omitted].
>
> Neither purpose applies here. **The Tribe has chosen to be absent. Nobody has denied it the "opportunity to be heard"**; in fact, the Oneida Indian Nation, which operates the Turning Stone Casino, has appeared as amicus curiae making much the same arguments we would expect to be made by the Tribe had it chosen to participate. **While sovereign immunity prevents the Tribe from being forced to participate in New York court proceedings, it does not require everyone else to forego the resolution of all disputes that could affect the Tribe** (see *Keene v Chambers*, 271 N.Y. 326, 330, 3 N.E.2d 443 [1936]; *Plaut v HGH Partnership*, 59 A.D.2d 686, 398 N.Y.S.2d 671 [1st Dept 1977]; 3 Weinstein-Korn-Miller, NY Civ Prac ¶ 1001.10 [citing cases]). **While we fully respect the sovereign prerogatives of the Indian tribes, we will not permit the Tribe's voluntary absence to deprive these plaintiffs (and in turn any member of the public) of their day in court.**
>
> . . . . .

> We conclude that the alleged constitutional violation will be without remedy if this action is dismissed for the Tribe's nonjoinder. **We further conclude that to the extent the Tribe is prejudiced by our adjudication of issues that affect its rights under the compact, the Tribe could have mitigated that prejudice by participating in the suit** (*cf. United States ex rel. Steele v Turn Key Gaming, Inc.*, 135 F.3d 1249, 1252 [8th Cir 1998]). The Tribe's nonjoinder is therefore excused, and we proceed to discuss the merits.

Pataki, 798 N.E.2d at 1058-59 (emphasis added).

Similarly, in *Pazner v. Doyle,* 680 N.W.2d 666 (Wis. 2004), *overruled in part on other grounds, Dairyland Greyhound Park, Inc. v. Doyle,* 719 N.W.2d 408 (Wis. 2006), the Majority Leader of the Wisconsin Senate and the Speaker of the Wisconsin Assembly, filed an action against the Governor of Wisconsin and the Secretary of Administration, contending that they violated the Wisconsin constitution in agreeing to certain amendments to a gaming compact entered into with the Forest County Potawatomi Tribe. The defendants moved to dismiss the action on grounds of standing and failure to join an indispensable party, namely the Indian tribe. The Wisconsin Supreme rejected both arguments for reasons similar to *Pataki:*

> The Tribe's decision not to participate as a party cannot deprive this court of its own core power to interpret the Wisconsin Constitution and resolve disputes between coequal branches of state government. The Tribe has been aware of this litigation from its inception. This court would have welcomed its intervention. We will not venture the delicate balance of shared power among our three branches of government on the chosen absence of a potential party.
>
> The upshot of accepting the Governor's invitation **to dispose of this case on procedural technicalities would be to insulate this agreement and any future agreement between a governor and a tribe from the powers of state judicial review.** For over 200 years, it has been the province of the judiciary to interpret the constitution and say what the law is. *See Wisconsin Senate,* 144 Wis. 2d at 436 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60, (1803)). We are responsible for resolving legal disputes

> among the three branches of our state government and, therefore, we proceed to the merits of the case.

Id at 683 (emphasis added).

Other jurisdictions are in agreement with the Wisconsin Supreme Court and the New York Court of Appeals that a tribe's absence due to sovereign immunity should not result in dismissal of the action. *See, e.g., Kansas v United States,* 249 F.3d 1213 (10th Cir 2001); *Sac and Fox Nation of Mo. v Norton,* 240 F.3d 1250 (10th Cir 2001) (later superseded by statute); *Artichoke Joe's v Norton,* 216 F. Supp. 2d 1084, 1090-1091 (E.D. Cal 2002).

The logic and reasoning of these cases are unassailable and applicable in the present case. Sovereign immunity prevents involuntary joinder of the tribes. However, it does not require the citizens of Idaho to forego resolutions of all disputes that could possibly affect the tribes, especially, as in this case, where there is a clear and blatant violation of the Idaho Constitution. Nor does it require or permit this Court to abdicate its constitutional duty to resolve cases and controversies over the constitutionality of an Act of the Idaho legislature. This Court cannot and should not allow the tribes' voluntary absence to deprive Plaintiffs of their day in court. Dismissal of this case on such a procedural technicality would be the equivalent of ruling that any and all acts of the Idaho legislature pertaining to Indian gaming and indeed to Indians in general, are forever insulated from judicial review, regardless whether the act is in clear violation of the Constitution, barring the courthouse doors to citizens of Idaho suffering concrete injury as a result of such unconstitutional acts. As recognized in *Pataki* and *Panzer,* this is entirely antithetical to our constitutional system of checks and balances and must be summarily rejected.

2. *The Tribes are not "indispensable" under Rule 19 by application of the "public rights" doctrine.*

Even under the distinguishable line of cases cited in the Defendants' briefing, the tribes in the instant case are not indispensable under the "public rights doctrine," concerning "litigation .... [which] transcends the private interests of the litigants and seeks to vindicate a public right." *Wilbur v. Locke*, 423 F.3d 1101, 1115 (9th Cir. 2006). Under this exception the absent party's interests may be impaired but will not be allowed to *destroy* those interests in the party's absence. *Id.*

The Ninth Circuit first applied this doctrine in *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012, 109 S. Ct. 1121, 103 L. Ed. 2d 184 (1989). In *Conner*, an environmental group challenged the issuance of oil and gas leases by the BLM on the ground that an adequate EIS had not been prepared. On appeal, several lessees claimed that they were necessary parties under Rule 19, but the Ninth Circuit held the public rights exception applicable:

> Subsequent courts have also refused to require the joinder of all parties affected by public rights litigation -- even when those affected parties have property interests at stake -- because of the tight constraints traditional joinder rules would place on litigation against the government. [many citations omitted] . . . Like the cases cited above, this case is amenable to the application of the *National Licorice* public rights doctrine. The appellees' litigation against the government does not purport to adjudicate the rights of current lessees; it merely seeks to enforce the public right to administrative compliance with the environmental protection standards of NEPA and the ESA.

Id. at 1459-60.

Likewise, Plaintiffs Knox and Dotson do not purport to adjudicate any rights of the parties under the tribes' compacts with the State of Idaho. They seek to enforce the public right to State compliance with the Idaho Constitution. The fact that they have suffered particularized injury does not somehow convert this issue from a public to a private matter. Indeed, the Ninth Circuit has

recognized that "[t]he general subject of gaming [is] of great public interest." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1026 (9th Cir. 2002). As the defendants recognize, the court in *Hull* refused to apply the public rights doctrine only because "[t]he plaintiff sought th[e] injunction to avoid competitive harm to their own operations," and therefore "the rights in issue between the plaintiffs in this case, the tribes and the state are more private than public." *Def's Brf.*, p. 14 (quoting *Hull*, 305 F.3d at 1026). But unlike *Hull*, Plaintiffs Knox and Dotson are not competitors of the tribes seeking to share in the spoils of casino gambling. They seek to vindicate the public's right to equal enforcement of the Idaho Constitution. If there is a public right in administrative enforcement of the procedural rules under NEPA and ESA as declared in *Conner*, then surely there is an even greater public right of the citizens of Idaho in enforcement of the substantive provisions of the Idaho Constitution.

Contrary to the Defendants' assertions, the tribes' interests are not "destroyed" by proceeding in their absence. The public rights exception was first recognized in *Nat'l Licorice v. NLRB*, 309 U.S. 350 (1940). In that case the Supreme Court

> restricted the applicability of the public rights exception to cases in which the third parties' interests at issue are not destroyed. That is, "the third parties [must be] left free to assert such legal rights as they might have acquired . . . ." *Id.* at 366. While the National Licorice Court upheld the NLRB's termination of an unlawful "yellow dog" contract, it ordered the Board to revise its order by omitting language that the contracts were "void and of no effect." The Court also required the Board to state that the order was "without prejudice to the assertion by the employees [the non-parties to the action] of any legal rights they may have acquired . . . ."

Conner, 848 F.3d at 1859-60 (quoting *Nat'l Licorice*, 309 U.S. at 367). Likewise, Plaintiffs Knox and Dotson do not request rescission or termination of the State's compacts with the tribes. They seek a declaration that I.C. §§ 67-429B and -429C are in direct violation of the Idaho Constitution.

The Court can similarly craft its declaration of unconstitutionality to make it without prejudice to the assertion of the tribes of any legal rights they may have acquired by compact with the State of Idaho. Consequently, the "public rights" exception applies here to prevent the tribes from being deemed indispensable under Rule 19. The Defendants' motion to dismiss must therefore be denied on this additional ground.

CONCLUSION

For the foregoing reasons, the Defendants' motion should be dismissed and the Court should proceed to schedule this matter for final decision on the merits.

DATED this 1 day of July, 2008.

THOMSEN STEPHENS LAW OFFICES, PLLC

By: _____
Curt R. Thomsen, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on July 1, 2008, I caused a true and correct copy of the foregoing to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon, by hand delivery, by transmitting by facsimile, or by placing said document in the attorney's courthouse box, as set forth below.

LAWRENCE G WASDEN
STEVEN L OLSEN
MICHAEL S GILMORE
CLAY R SMITH
PO BOX 83720
BOISE ID 83720-0010

[X] U.S. Mail
[ ] Hand Delivery
[X] Facsimile

DAVID F HENSLEY
PO BOX 83720
BOISE ID 83720-0034

[X] U.S. Mail
[ ] Hand Delivery
[X] Facsimile

THOMSEN STEPHENS LAW OFFICES, PLLC

By: _____
Curt R. Thomsen

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LAWRENCE G. WASDEN
Attorney General

STEVEN OLSEN
Deputy Attorney General
Chief, Civil Litigation Division
MICHAEL S. GILMORE
ISB #1625; mike.gilmore@ag.idaho.gov
CLAY R. SMITH
ISB #6385; clay.smith@ag.idaho.gov
Deputy Attorneys General
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8072

DAVID F. HENSLEY
ISB # 6600; dhensley@gov.idaho.gov
Counsel to the Governor
Office of the Governor
P.O. Box 83720
Boise, Idaho 83720-0034
Telephone: (208) 334-2100
Facsimile: (208) 334-3454

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

WENDY KNOX, and RICHARD DOTSON, Plaintiffs, v. STATE OF IDAHO, ex rel. C. L. OTTER, Governor; BEN YSURSA, Secretary of State; and LAWRENCE WASDEN, Attorney General, Defendants.	Case No. CV-2008-667 DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants hereby give notice of decisional authority that is relevant to disposition of the Motion to Dismiss set for hearing on August 18, 2008 and was issued subsequent to submission of their reply brief in support of the motion.

On June 12, 2008, the United States Supreme Court issued its opinion in *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180 (2006). The Supreme Court held that the Ninth Circuit Court of Appeals abused its discretion in holding that the Republic of the Philippines was not an indispensable party under Fed. R. Civ. P. 19 despite the Philippines' entitlement to sovereign immunity under the Foreign Sovereign Immunities Act of 1979, 28 U.S.C. § 1604. It found that the court of appeals erred in considering the merits of the plaintiffs' claim as part of the Rule 19 decision-making process. *See* 128 S. Ct. at 2192 ("it was improper to issue a definitive holding regarding a nonfrivolous, substantive claim made by an absent, required entity that was entitled by its sovereign status to immunity from suit").* The Court further stated that while "[d]ismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims[,] . . . that result is contemplated under the doctrine of foreign sovereign immunity." *Id.* at 2194. These holdings are germane to arguments made in Plaintiffs' Supplemental Memorandum in Opposition to Defendants' Motion to Dismiss at pages 8-10 and 11-15.

On August 8, 2008, the Ninth Circuit issued its opinion in *Cachil Dehe Band of Wintun Indians v. California*, No. 06-16145, 2008 WL 3169486 (9th Cir. Aug. 8, 2008). The court of appeals held that the district court erred in dismissing under Rule 19 a tribe's claims which challenged, *inter alia*, the California Gaming Control Commission's calculation of the size of a

* Amendments to Fed. R. Civ. P. 19 became effective following the Ninth Circuit's decision. Most importantly, they replaced the term "necessary" in subparagraph (a) with the term "required" and deleted the term "indispensable" in subparagraph (b). 128 S. Ct. at 2184. These and another amendment, however, "were *stylistic only*[;]" *i.e.*, "the substance of and operation of the Rule . . . are unchanged." *Id.* The federal rule therefore remains instructive with respect to proper application of I.R.C.P. 19.

gaming-machine license pool. The lower court reasoned that the relief sought might affect adversely the monetary interest of certain non-party tribes who had competed with the plaintiff tribe for the available licenses. The district court opinion, *San Miguel Band of Mission Indians v. California*, No. 06cv0988-LAB, 2007 WL 935578 (S.D. Cal. Mar. 20, 2007), is cited at page 15 of the Brief in Support of Defendants' Motion to Dismiss. The court of appeals stated, in part, that "[t]he mere fact that the outcome of [the] litigation may have some financial consequences for the non-party tribes is not sufficient to make those tribes required parties." under Rule 19(a). *Id.*, at *5. Rather, "[t]he absent tribes must have a legally protected interest." *Id.* Such an interest could exist "if it actually 'arises from terms in bargained contracts[,]'" but the gaming compacts in effect at the time of the license-pool determination "afford[ed] no express or implied protection against competition per se." *Id.* (quoting *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002)). The Ninth Circuit's analysis is germane to arguments made in the Brief in Support of Defendants' Motion to Dismiss at pages 10-17.

DATED this 11th day of August 2008.

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

STEVEN OLSON
Deputy Attorney General
Chief, Civil Litigation Division
MICHAEL S. GILMORE
Deputy Attorney General
Civil Litigation Division

DAVID F. HENSLEY
Counsel to the Governor
Office of the Governor

By: _____
CLAY R. SMITH
Deputy Attorney General
Natural Resources Division

CERTIFICATE OF SERVICE

I certify that on the 11th day of August 2008 I caused to be served a true and correct copy of the foregoing upon the following party by the method listed below:

CURT R. THOMSEN, ESQ.
T. JASON WOOD, ESQ.
THOMSEN STEPHENS LAW OFFICES, PLLC
2635 CHANNING WAY
IDAHO FALLS ID 83404

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Federal Express
X Facsimile: 208-522-1277
☐ Statehouse Mail

CLAY R. SMITH

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

WENDY KNOX and RICHARD DOTSON,

Plaintiffs,

-vs-

STATE OF IDAHO, *ex rel* C.L. OTTER, Governor; BEN YSURA, Secretary of State; and LAWRENCE WASDEN, Attorney General,

Defendants.

Case No. CV-2008-667

MINUTE ENTRY

This matter came before the Court the 18th day of August 2008 for the purpose of Defendants' MOTION TO DISMISS, the Honorable Darren B. Simpson presiding.

Ms. Sandra Beebe, Court Reporter, and Ms. Marielle Pratt, Deputy Clerk, were present.

Mr. Curt Thomsen, Esq., appeared on behalf of the plaintiffs. Mr. Clay Smith, Esq., and Mr. Michael Gilmore, Esq., appeared on behalf of the defendants.

Court and counsel discussed the status of the case. Discussion was heard regarding an amended complaint received by the Court. The amended complaint will be considered filed as of June 2, 2008.

Mr. Smith presented argument. Mr. Thomsen responded, and Mr. Smith provided rebuttal argument.

The Court took the matter under advisement and will issue a written decision.

DATED this 18th day of August 2008.

DARREN B. SIMPSON
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a full, true and correct copy of the foregoing document was delivered by first-class mail, facsimile or designated box this 19 day of August 2008 to the following:

CURT THOMSEN, ESQ.
2635 CHANNING WAY
IDAHO FALLS, ID 83404

☑ U.S. Mail ☐ Courthouse Box ☐ Facsimile

CLAY R. SMITH, ESQ.
DEPUTY ATTORNEY GENERAL
PO BOX 83720
BOISE, ID 83720-0010

☑ U.S. Mail ☐ Courthouse Box ☐ Facsimile

SARA STAUB, Clerk of the Court

Deputy Clerk

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF IDAHO

IN AND FOR THE COUNTY OF BINGHAM

WENDY KNOX and RICHARD DOTSON, Plaintiffs, vs. STATE OF IDAHO, ex. rel. C.L. OTTER, Governor; BEN YSURSA, Secretary of State; and LAWRENCE WASDEN, Attorney General, Defendants.	Case No. CV 2008-667 **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**

I. INTRODUCTION

BEFORE THIS COURT came to be heard the Motion of the defendants, the state of Idaho, ex rel. C. L. Otter, Governor; Ben Ysursa, Secretary of State; and Lawrence Wasden, Attorney General (hereinafter collectively referred to as the "State"), to Dismiss.[1] The plaintiffs, Wendy Knox and Richard Dotson (hereinafter the "Plaintiffs"), oppose the State's Motion and filed briefs in support thereof.[2]

[1] Defendants' Motion to Dismiss (Supporting Brief to Be Submitted Pursuant to I.R.C.P. 7(b)(3)(C)), *Knox v. State*, Bingham County case no. CV 2008-667 (filed April 14, 2008) (hereinafter the **"State's Motion"**).

[2] See: Memorandum in Opposition to Defendants' Motion to Dismiss, *Knox v. State*, Bingham County case no. CV 2008-667 (filed June 2, 2008) (hereinafter the ***"Plaintiffs' Memorandum"***); Supplemental Memorandum in Opposition to Defendants' Motion to Dismiss, *Knox v. State*, Bingham County case no. CV 2008-667 (filed July 1, 2008) (hereinafter the **"Plaintiffs' Supplement"**).

This Court held a hearing on the State's Motion on August 18, 2008.[3] Having reviewed the evidence, the arguments of the parties and the relevant authorities, this Court shall grant the State's Motion to Dismiss on the ground that the Plaintiffs failed to show a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury.

II. BACKGROUND

The Plaintiffs, citizens of Bingham County, allege they developed "clinical and devastating addictions" to gambling at the slot machines at the Fort Hall Indian Reservation Casino (hereinafter the "Fort Hall Casino").[4] They filed this lawsuit to challenge the constitutionality of Idaho Code ("I.C.") § 67-429B and § 67-429C, which code sections were enacted upon the Idaho electorate's vote in favor of Proposition One during the November 5, 2002 general election.[5]

Idaho Code § 67-429B reads as follows:

> (1) Indian tribes are authorized to conduct gaming using tribal video gaming machines pursuant to state-tribal gaming compacts which specifically permit their use. A tribal video gaming machine may be used to conduct gaming only by an Indian tribe, is not activated by a handle or lever, does not dispense coins, currency, tokens, or chips, and performs only the following functions:
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> (a) Accepts currency or other representative of value to qualify a player to participate in one or more games;
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> (b) Dispenses, at the player's request, a cash out ticket that has printed upon it the game identifier and the player's credit balance;
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> (c) Shows on a video screen or other electronic display, rather than on a paper ticket, the results of each game played;
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> (d) Shows on a video screen or other electronic display, in an area separate from the game results, the player's credit balance;
>
> (e) Selects randomly, by computer, numbers or symbols to determine game results; and
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> (f) Maintains the integrity of the operations of the terminal.
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> (2) Notwithstanding any other provision of Idaho law, a tribal video gaming machine as described in subsection (1) above is not a slot machine or an electronic or electromechanical imitation or simulation of any form of casino gambling.

[3] Minute Entry, *Knox v. State*, Bingham County case no. CV 2008-667 (filed August 19, 2008).
[4] *Amended Complaint for Declaratory Judgment*, *Knox v. State*, Bingham County case no. CV 2008-667 (filed June 2, 2008) (hereinafter the **"Amended Complaint"**), at pp. 1, 3.
[5] Amended Complaint, at p. 1.

Idaho Code § 67-439C holds:

(1) Any tribe with an existing state-tribal gaming compact may amend its compact throughout the procedure set forth in subsection (2) below to incorporate all of the following terms:

(a) As clarified by this compact amendment, the tribe is permitted to conduct gaming using tribal video gaming machines as described in Section 67-429B, Idaho Code.

(b) In the10 years following incorporation of this term into its compact, the number of tribal video gaming machines the tribe may possess is limited to the number of tribal video gaming machines possessed by the tribe as of January 1, 2002, plus 25% of that number; provided, however, that no increase in any single year shall exceed 5% of the number possessed as of January 1, 2002. Thereafter, the tribe may operate such additional tribal video gaming machines as are agreed to pursuant to good faith negotiations between the state and the tribe under a prudent business standard.

(c) To the extent such contributions are not already required under the tribe's existing compact, the tribe agrees to contribute 5% of its annual net gaming income for the support of local educational programs and schools on or near the reservation. The tribe may elect to contribute additional sums for these or other educational purposes. Disbursements of theses funds shall be at the sole direction of the tribe.

(d) The tribe agrees not to conduct gaming outside of Indian lands.

(3) To amend its compact to incorporate the terms set forth in subsection (1) above, a tribe shall deliver to the Secretary of State a tribal resolution signifying the tribe's acceptance of the terms. Immediately upon delivery of such tribal resolution to the Secretary of State, (a) the tribe's state-tribal gaming compact shall be deemed amended to incorporate the terms; (b) the tribe's compact as so amended shall be deemed approved by the state in accordance with Section 67-429A, Idaho Code, without the need for further signature or action by the executive or legislative branches of state government, and (c) except to the extent federal government approval is required, the newly incorporated compact terms shall be deemed effective immediately.

(4) Nothing in this section shall be construed to (a) indicate that any gaming activity currently conducted by any tribe is unauthorized or otherwise inappropriate under Idaho law or the tribe's existing compact, or (b) prohibit a tribe from negotiating with the state for an initial compact or a compact amendment regarding tribal video gaming machines or any other matter through a procedure other than the procedure specified in subsection (2) above or which contains terms different than those specified in subsection (1) above.

The Plaintiffs allege that these code sections violate Idaho Constitution, Article III, § 20,[6] which states:

> (1) Gambling is contrary to public policy and is strictly prohibited except for the following:
> a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation; and
> b. Pari-mutuel betting if conducting in conformity with enabling legislation; and
> c. Bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.
> (2) No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat, keno and slot machines, or employ any electronic or electromechanical imitation or simulation of any form of casino gambling.
> (3) The legislature shall provide by law penalties for violations of this section.
> (4) Notwithstanding the foregoing, the following are not gambling and are not prohibited by this section:
> a. Merchant promotional contests and drawings conducted incidentally to bona fide nongaming business operations, if prizes are awarded without consideration being charged to participants; and
> b. Games that award only additional play.

The State contends that the Plaintiffs' alleged injuries cannot be redressed without the joinder of the Shoshone-Bannock Tribe (hereinafter the "Tribe"),[7] which is impossible due to the Tribe's sovereign immunity.[8] The State further argues that even if the action could proceed without the Tribe, this Court cannot enter a declaratory judgment because the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2710 *et seq.* (the "IGRA"), together with the "Shoshone-Bannock Tribes and the State of Idaho Compact for Class III Gaming" (hereinafter the "Compact"), preempts this Court's jurisdiction over disputes regarding the Compact.[9] The State also raises the issue of the Plaintiffs' standing to bring this suit on the basis that a declaratory judgment does not redress the Plaintiffs'

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[6] Amended Complaint, at pp. 1-2.

[7] According to the honorable Lynn Winmill, federal district judge, the "Shoshone and Bannock Tribes" is a single, federally-recognized Indian Tribe. See: Affidavit of Clay R. Smith, *Knox v. State*, Bingham County case no. CV 2008-667 (filed April 28, 2008) (hereinafter the **"Smith Affidavit"**), at Exhibit 5, p. 8, footnote 4.

[8] Brief in Support of Defendants' Motion to Dismiss, *Knox v. State*, Bingham County case no. CV 2008-667 (filed April 28, 2008) (hereinafter the **"State's Brief"**), at p. 1.

[9] State's Brief, at p. 2.

alleged injuries-in-fact.[10]

III. DISCUSSION

The State initially alleges that the Plaintiffs' Amended Complaint should be dismissed on three bases: (1) lack of subject matter jurisdiction pursuant to Idaho Rule of Civil Procedure ("I.R.C.P.")12(b)(1); (2) failure to state a claim upon which relief can be granted under I.R.C.P. 12(b)(6); and (3) failure to join an indispensible party under I.R.C.P. 12(b)(7). This Court shall discuss each of these bases seriatim.

A. Lack of Subject Matter Jurisdiction.

In its Motion, the State argues this Court lacks subject matter jurisdiction to adjudicate whether certain gaming machines operated by the Tribe comply with "state law requirements."[11] However, the Plaintiffs are not asking for an adjudication of whether certain gaming machines operated by the Tribe comply with state law requirements. Instead, they argue that certain state statutes, which concern tribal video gaming machines, do not conform to the parameters of Article III, § 20 of the Idaho Constitution.[12]

Although the State, in its Brief, raises the issue of this Court's lack of authority to issue relief to the Plaintiffs, the State does not premise its argument upon I.R.C.P. 12(b)(1) but on I.R.C.P. 12(b)(6).[13] Nowhere in the State's briefing does the State rely upon the standard of review applied to I.R.C.P. 12(b)(1).[14] Accordingly, this Court shall consider the State's lack of authority arguments under the I.R.C.P. 12(b)(6) standard.

[10] State's Brief, at p. 9; Reply Brief in Support of Defendants' Motion to Dismiss, *Knox v. State*, Bingham County case no. CV 2008-667 (filed June 5, 2008) (hereinafter the **"State's Reply"**).
[11] State's Motion, at p. 2.
[12] Plaintiffs' Memorandum, at pp. 2, 7.
[13] State's Brief, at p. 2.
[14] See, e.g. State's Brief; State's Reply; Defendant's Notice of Supplemental Authority, *Knox v. State*, Bingham County case no. CV 2008-667 (filed August 11, 2008) (hereinafter the **"State's Supplement"**).

B. Failure to State a Cause of Action upon which Relief can be Granted.

The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for adjudicating a motion for summary judgment.[15] In other words, the non-moving party is entitled to have all inferences from the record and pleadings viewed in his or her favor and only then may the question be asked whether a claim for relief has been stated.[16] Dismissal is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief.[17] However, this Court need not find that the Plaintiffs can only obtain the particular relief prayed for, as long as the Court can ascertain that some relief may be granted.[18]

The only facts which a court may properly consider on a motion to dismiss are those appearing in the complaint, supplemented by those facts of which the court may properly take judicial notice.[19] If a court considers matters outside the pleadings on a Rule 12(b)(6) motion to dismiss, such motion must be treated as a motion for summary judgment and the proceedings thereafter must comport with the hearing and notice requirements of I.R.C.P. 56.[20]

In support of its Motion, the State submitted the Smith Affidavit. The State argues that the exhibits attached to the Smith Affidavit are matters of public record and therefore this Court's consideration of them does not convert the State's Motion to motion for summary judgment.[21] Attached to the Smith Affidavit are the following: (1) Affidavit of Miren E. Artiach, filed in the United States District Court for the District of Idaho, consolidated case nos. CIV 01-

[15] *Idaho Schools for Equal Educational Opportunity v. Evans*, 123 Idaho 573, 578, 850 P.2d 724, 729 (1993).
[16] *Idaho Schools for Equal Educational Opportunity*, 123 Idaho at 578, 850 P.2d at 729; *Miles v. Idaho Power Company*, 116 Idaho 635, 637, 668 P.2d 757, 759 (1989); *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct. App. 1992); *Ernst v. Hemenway & Moser, Co.*, 120 Idaho 941, 946, 821 P.2d 996, 1001 (Ct. App. 1991).
[17] *Harper*, 122 Idaho at 536, 835 P.2d at 1347; *Ernst v. Hemenway*, 120 Idaho at 946, 821 P.2d at 1001.
[18] *Harper*, 122 Idaho at 536, 835 P.2d at 1347.
[19] *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990); *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 133, 106 P.3d 455, 459 (2005).
[20] *Hellickson*, 118 Idaho at 276, 796 P.2d at 153.
[21] State's Motion, at p. 7.

52-E-BLW and CIV 01-171-E-BLW;[22] (2) Order, *Bell v. Cenarrusa,* Idaho Supreme Court case no. 29226 (dated June 2, 2003);[23] (3) Order Denying Petition for Rehearing, *Bell v. Cenarrusa,* Idaho Supreme Court case no. 29226 (dated October 16, 2003);[24] (4) The Shoshone-Bannock Tribes and the State of Idaho Compact for Class III Gaming;[25] and (5) Memorandum Decision and Order, *Shoshone-Bannock Tribes v. Idaho*, United States District Court for the District of Idaho case nos. CV-01-052-E-BLW and CV-01-171-E-BLW (filed April 12, 2004).[26] All of these documents, save for the Compact, reveal on their face that they have been filed (without qualification) with or by various state and federal courts and are, therefore, matters of public record.[27] Although the Compact does not show, on its face, that it has been made a part of the public record in a previous state or federal case, the Plaintiffs do not dispute the authenticity of Exhibit 4 to the Smith Affidavit.[28] Neither do the Plaintiffs contend that this Court must consider this matter under the I.R.C.P. 56(c) standard of review.[29] Accordingly, this Court shall not convert the State's Motion to a motion for summary judgment, despite the documents attached to the Smith Affidavit.

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[22] Smith Affidavit, at Exhibit 1.
[23] Smith Affidavit, at Exhibit 2.
[24] Smith Affidavit, at Exhibit 3.
[25] Smith Affidavit, at Exhibit 4.
[26] Smith Affidavit, at Exhibit 5.
[27] See: *U.S. v. 14.02 Acres of Land More or Less in Fresno County*, 530 F.3d 883, 894 (9th Cir. 2008).
[28] See: Plaintiffs' Memorandum; Plaintiffs' Supplement. See also: *Lord v. Swine Pacific Holdings, Inc.*, 203 F.Supp.2d 1175, 1178 (D. Idaho 2002).
[29] See: Plaintiffs' Memorandum; Plaintiffs' Supplement. Again, the standard of review for an I.R.C.P. 12(b)(6) motion to dismiss is the same as an I.R.C.P. 56(c) motion for summary judgment. *Idaho Schools for Equal Educational Opportunity v. Evans*, 123 Idaho 573, 578, 850 P.2d 724, 729 (1993).

C. The Tribe is Not an Indispensible Party to this Lawsuit.

Initially, the State argues that the Tribe is an indispensible party to this litigation and, because it cannot be sued without its permission, this matter must be dismissed.[30] Idaho Rule of Civil Procedure 12(b)(7) requires that the failure to join indispensible parties must be raised as an affirmative defense, after which the burden falls on the plaintiffs to join "all parties who have or claim any interest which would be affected by the declaration."[31] Whether a party is indispensable to an action depends largely upon the relief sought.[32]

The basis for the State's argument is the premise that the only means of effecting relief for the plaintiffs is by modification of the Tribe's Compact with the State.[33] The plaintiffs respond that they are not challenging or seeking to invalidate any tribal compacts with the State, but are merely seeking a judgment declaring I.C. § 67-429B and § 67-429C unconstitutional.[34]

Declaratory judgments are authorized in Idaho under I.C. § 10-1201, *et seq.* Relevant code sections under Title 10, Chapter 12 read:

> **10-1201. Declaratory judgments authorized – Form and effect.** - Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

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[30] State's Brief, at pp. 10-17. Tribal sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 928 (7th Cir. 2008) (*Ho-Chunk II*) [citing: *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 894, 106 S. Ct. 2305, 90 L.Ed.2d 881 (1986)]. Tribal sovereign immunity extends to suits for declaratory relief. *Ho-Chunk II*, 512 F.3d at 928 [citing: *Imperial Granit Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59, 98 S. Ct. 1670, 56 L.Ed2d 106 (1978)]. Thus, suits against Indian tribes are barred by sovereign immunity without a clear waver by the tribe or congressional abrogation. *Ho-Chunk II*, 512 F.3d at 928 [citing: *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S. Ct. 905, 909, 112 L.Ed.2d 1112 (1991)].

[31] *Hartman v. United Heritage Property and Casualty Company*, 141 Idaho 193, 198, 108 P.3d 340, 345 (2005) [citing: I.C. § 10-1211; *Tomchak v. Walker*, 108 Idaho 446, 449, 700 P.2d 68, 71 (1985)].

[32] *Idaho Schools for Equal Educational Opportunity v. State*, 132 Idaho 559, 976 P.2d 913 (1998) [citing: *Barlow v. International Harvester Company*, 95 Idaho 881, 896, 522 P.2d 1102, 1117 (1974)].

[33] State's Brief, at p. 9.

[34] Plaintiffs' Memorandum, at pp. 2, 7.

> **10-1202. Person interested or affected may have declaration.** – Any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.
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> **10-1211. Parties to action – Municipal order or franchise.** – When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involved the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served, and be entitled to be heard and may intervene.
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> ***10-1212. Construction of act.*** – This act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered.

This Court has authority to render a declaratory judgment as to the constitutionality of a state statute.[35]

This Court must then inquire whether the Tribe is an indispensable party to an adjudication of the constitutionality of I.C. § 67-429B and § 67-429C. Under I.R.C.P. 19(a)(1), a party shall be joined if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

[35] See: *Gallagher v. State*, 141 Idaho 665, 668, 115 P.3d 756, 759 (2005).

This Court's decision regarding whether or not the Tribe is an indispensable party is discretionary.[36] This Court must therefore: (1) correctly perceive the issue as one of discretion; (2) act within the boundaries of its discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) reach its decision by an exercise of reason.[37]

The Plaintiffs in this case do not seek to enjoin the Tribe from operating the tribal video gaming machines located in the Fort Hall Casino. The Plaintiffs do not seek, by this action, to enjoin the use of tribal video gaming machines by all of the Indian tribes in the state of Idaho. They are seeking a declaration that I.C. § 67-429B and § 67-429C are unconstitutional.

Should this Court ultimately grant the relief the Plaintiffs request, such declaration will not invalidate the Compact between the Tribe and the State, which Compact the Tribe and the State executed prior to the enactment of I.C. § 67-429B and § 67-429C.[38] The Tribe's legally protectable interest in operating tribal video gaming machines flows from the Compact, not from I.C. § 67-429B and § 67-429C. The Tribe's ability to protect its interests under the Compact is provided for by the Compact, and, to a certain extent, by IGRA.

Furthermore, a final adjudication that I.C. § 67-429B and § 67-429C are unconstitutional, should such outcome occur, does not necessarily result in the renegotiation of the Compact by the State and the Tribes. Although renegotiation is certainly a possibility, another alternative is for the Idaho Legislature to pursue alternative legislation, amendment of Article III, § 20 of the Idaho Constitution, arbitration under the terms of the Contract, or renewed litigation in federal district court regarding the scope of gaming allowed in Idaho. Interpretation of the Compact is not an issue before this Court. Neither can this Court speculate as to how the State would ultimately proceed upon an ultimate finding that I.C. § 67-429B and § 67-429C violate the Idaho

[36] *Utter v. Gibbins*, 137 Idaho 361, 366, 48 P.3d 1250, 1255 (2002).
[37] *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).
[38] See: Smith Affidavit, at Exhibit 4, pp. 31-33. The Tribe and the State signed the Compact on February 18, 2000. Idaho Code § 67-429B and § 67-429C went into effect in November of 2002.

Constitution.[39]

Finally, this Court considers whether the absence of the Tribe from this suit leaves either the Plaintiffs or the State subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the Plaintiffs' request for a declaration that I.C. § 67-429B and § 67-429C are unconstitutional. Should this Court, and ultimately the Idaho Supreme Court, determine that I.C. § 67-429B and § 67-429C are inconsistent with Art. III, § 20 of the Idaho Constitution, that finding would be the same regardless of the party bringing the claim. Any additional action by the State, necessitated by a finding of unconstitutionality, would be consistent with the finding of constitutionality, rather than inconsistent therewith.

Based upon these findings, this Court concludes that the Tribe is not an indispensable party to this lawsuit.

D. IGRA doe not Preempt State Court Action Adjudicating the Constitutionality of State Statutes.

The State argues that the Plaintiffs' cause of action is preempted by IGRA.[40] This Court notes, however, that IGRA confers jurisdiction on the federal district courts in three (3) instances: (1) for "any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe ... or to conduct such negotiations in good faith;" (2) for "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact;" or (3) for "any cause of action initiated by the Secretary to enforce the procedures" prescribed in IGRA.[41]

None of the instances set forth in IGRA are found in this lawsuit. The Tribe has not filed suit arising from the failure of the State to negotiate a compact or conduct negotiations in good

[39] See: *Idaho Schools for Equal Educational Opportunity v. State*, 132 Idaho 559, 568, 976 P.2d 913, 922 (1998).
[40] State's Brief, at pp. 17-27.
[41] 25 U.S.C. § 2710(d)(7)(A)(i)-(iii); *Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655, 659-60 (7th Cir. 2006)(*Ho-*

faith, neither the State nor the Tribe filed suit to enjoin class III gaming conducted in violation of the Compact, and the lawsuit was not filed by the Secretary to enforce the procedures prescribed in IGRA.

For these reasons, this Court finds that the Plaintiffs' suit for a declaratory judgment is not preempted by IGRA.

E. The Plaintiffs have Not Established that a Declaratory Judgment will Redress their Claimed Injuries.

The question then becomes whether or not a citizen of this County, allegedly addicted due to the proximity of tribal video gaming machines, may maintain a petition for a declaration that I.C. § 67-429B and § 67-429C are unconstitutional where such declaration does not necessarily rid the area of the offending gaming machines.

As the State correctly asserts, the Plaintiffs must establish standing in order to maintain their suit for a declaratory judgment.[42] It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing.[43] The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated.[44] In order to satisfy the case or controversy requirement of standing, a litigant must "allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury."[45] Finally, a citizen may not challenge a governmental enactment where the injury is one suffered alike by all citizens of the jurisdiction.[46]

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[42] State's Brief, at pp. 7-9.

[43] *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 124, 15 P.3d 1129, 1132 (2000).

[44] *Thomson v. City of Lewiston*, 137 Idaho 473, 477, 50 P.3d 488, 492 (2002) [citing: *Miles v. Idaho Power Company*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989); *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996)].

[45] Id.

[46] Id.

Idaho Code § 67-429B authorizes Indian tribes, in conjunction with a compact with the State, to conduct gaming using video gaming machines and defines the term "tribal video gaming machine." Idaho Code § 67-429C describes how Indian tribes may amend their compacts with the State and includes the term "tribal video gaming machine" as defined in Idaho Code § 67-429B.

The Plaintiffs allege that after the enactment of I.C. § 67-427B and § 67-427C, and after the installation of slot machines at the Fort Hall Casino, they became compulsive gamblers, driving the short distance from their homes to Fort Hall Casino three (3) to four (4) times per week.[47] The Plaintiffs gambled exclusively at Fort Hall Casino, using only the slot machines.[48] The Plaintiffs have allegedly developed "clinical and devastating addictions to gambling at Fort Hall Casino and estimate their losses at $30,000.00 to $50,000.00.[49] They allege that they have paid additional sums they otherwise would not have incurred in seeking treatment.[50] The Plaintiffs claim that had the State not enacted I.C. § 67-427B and § 67-429C, neither Wendy Knox nor Richard Dotson would have suffered the alleged harm.[51]

The State does not dispute these facts for purposes of its dispositive motion.[52] Indeed, where standing is the issue raised by a motion to dismiss, this Court must construe Plaintiffs' claims as true.[53]

Instead, the State urges that a judgment declaring I.C. § 67-427B and § 67-429C unconstitutional would not prevent or redress the claimed injury.[54] Indeed, should Plaintiffs receive the ultimate relief they request, a final adjudication that I.C. § 67-427B and § 67-429C

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[47] Amended Complaint, at p. 3.
[48] Id.
[49] Id.
[50] Amended Complaint, at p. 4.
[51] Id.
[52] State's Brief, at p. 9.
[53] *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206, 45 L.Ed.2d 343 (1975).
[54] Id.

are unconstitutional, their injuries would not be redressed. For the same reasons that the State cannot show that the Tribe is an indispensable party, the Plaintiffs cannot show that a favorable conclusion to their lawsuit would redress their injuries.

Specifically, the Compact, which predates the enactment of I.C. § 67-427B and § 67-429C, establishes that: (1) the State questioned whether the "electronic gaming currently conducted by the Tribes in Idaho" fell within the confines of Article III, § 20 of the Idaho Constitution; (2) the Tribe interpreted IGRA to mean that the Tribe was entitled to offer any gaming activities "that is otherwise permitted by any person, organization, or entity for any purpose;" and (3) the Tribe took the alternative position that if Article III, § 20 of the Idaho Constitution did prohibit electronic games currently conducted by the Tribe, then the Tribe was entitled to offer electronic facsimiles of any lottery game reasonably defined as owned and operated by government entities.[55] The State and the Tribe agreed to resolve the dispute of what gaming the Tribes were allowed to conduct under IGRA by either or both parties filing a declaratory judgment action in the U.S. District Court for the District of Idaho.[56] The parties agreed to abide by the final judicial determination of the declaratory judgment action(s).[57]

Both parties filed suit for a declaratory judgment in the U.S. District Court for the District of Idaho, which suits were consolidated.[58] During the pendency of the federal lawsuit, the parties notified the U.S. District Court of the passage of Proposition One and the resultant enactment of I.C. § 67-429B and § 67-429C.[59] Based upon the enactment of I.C. § 67-429B and § 67-429C, the State (and consequently the U.S. District Court) [60] shifted its focus from the types of games allowed under the Idaho Constitution, to whether or not the Compact required the Tribe

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[55] Smith Affidavit, at Exhibit 4, pp. 6-7.
[56] Smith Affidavit, at Exhibit 4, pp. 8-9.
[57] Smith Affidavit, at Exhibit 4, pp. 10-12.
[58] See: Smith Affidavit, at Exhibit 5, p. 4.
[59] Smith Affidavit, at Exhibit 5, pp. 5-7.
[60] See: Smith Affidavit, at Exhibit 5, p. 4.

to submit to renegotiation of the Compact in order to utilize tribal video gaming machines.[61] Thus, the U.S. District Court did not adjudicate the issue of and whether or not tribal video gaming machines fit within Article III, § 20 of the Idaho Constitution.[62] Likewise, the Ninth Circuit Court of Appeals adjudicated the parties' rights under the Compact and did not address the constitutionality of I.C. § 67-429B and § 67-429C.[63]

Under this factual scenario, should the Plaintiffs attain the ultimate relief they seek, then the Tribe and the State will fall back upon their Compact, which allows the Tribe to operate any gaming activity that the State permits for any purpose by any person, organization, or entity.[64] Either the State or the Tribe may request renegotiation of the Compact.[65] Whether or how the State or the Tribe might return to the U.S. District Court for a finding as to the constitutionality of tribal video gaming machines is a question of interpretation of the Compact, which is not before this Court. Whether or not the State will seek to pass other legislation, or to amend the Idaho Constitution, is highly speculative.

In order for this Court to determine whether a declaratory judgment will prevent or redress the Plaintiffs' claimed injuries, the Plaintiffs must prove that the practical consequence of such judgment would amount to a significant increase in the likelihood that they would obtain relief that directly redresses the injury suffered.[66] This "significant increase in the likelihood of relief" is not present in this case. This Court cannot speculate as to the outcome of any relitigation or renegotiation of the Compact, or any efforts on the part of the State to introduce different statutes or even a constitutional amendment. A declaration that I.C. § 67-429B and §

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[61] See: Smith Affidavit, at Exhibit 5, p. 8.
[62] See also: *Bell v. Cenarrusa*, Idaho Supreme Court Order no. 29226 (dated June 2, 2003) wherein the Idaho Supreme Court declined to rule on the challenge to the constitutionality of Proposition One for lack of original jurisdiction.
[63] See: *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095 (9th Cir. 2006). 201
[64] See: Smith Affidavit, at Exhibit 4, p. 7 and p. 30.
[65] Smith Affidavit, at Exhibit 4, p. 30.
[66] *Utah v. Evans*, 536 U.S. 452, 464, 122 S. Ct. 2191, 2199, 153 L.Ed.2d 453 (2002).

67-429C are unconstitutional does not, without other, intervening events, rid the Plaintiffs of the proximity of the slot machines to which they claim to be addicted.[67]

For these reasons, this Court finds that the Plaintiffs have not established standing and this Court is compelled to grant the State's Motion to Dismiss.

IV. CONCLUSION AND ORDER

Although this Court does not find that the Tribe is an indispensable party to this suit, the Court does find that the Plaintiffs have not demonstrated that the relief sought will redress their claimed injuries. Therefore, the Plaintiffs lack standing to maintain this action, and the lawsuit must be dismissed. The State's Motion to Dismiss is therefore **granted.**

IT IS SO ORDERED AND DATED this 21ST day of September 2008.

DARREN B. SIMPSON
District Judge

[67] See: *McConnell v. Federal Election Commission*, 540 U.S. 93, 229, 124 S. Ct. 619, 709, 157 L.Ed2d 491 (2003) ("The relief the Paul plaintiffs seek is for this Court to strike down the contribution limits, removing the alleged disparate editorial controls and economic burdens imposed on them. But [Bipartisan Campaign Reform Act of 2002 "BCRA"] § 307 merely increased and indexed for inflation certain FECA [Federal Election Campaign Act of 1971] contribution limits. * * * Although this Court has jurisdiction to hear a challenge to [BCRA] § 307, if the Court were to strike down the increases and indexes established by BCRA § 307, it would not remedy the Paul plaintiffs' alleged injury because both the limitations imposed by FECA and the exemption for news media would remain unchanged. A ruling in the Paul plaintiffs' favor, therefore, would not redress their alleged injury and they accordingly lack standing.")

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a full, true and correct copy of the foregoing Order Granting Defendants' Motions to Dismiss was mailed by first class mail with prepaid postage and/or hand delivered and/or sent by facsimile this 22 day of September 2008, to:

Curt R. Thomsen, Esq.
T. Jason Wood, Esq.
THOMSEN STEPHENS LAW OFFICES, P.C,
2635 Channing Way
Idaho Falls, ID 83404

☑ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Lawrence G. Wasden, Esq.
Attorney General
Steven Olsen, Esq.
Deputy Attorney General
Chief, Civil Litigation Division
Michael S. Gilmore, Esq.
Clay R, Smith, Esq.
Deputy Attorneys General
P.O. Box 83720
Boise, ID 83720-0010

☑ U.S. Mail ☐ Courthouse Box ☐ Facsimile

David F. Hensley, Esq.
Counsel to the Governor
Office of the Governor
P.O. Box 83720
Boise, ID 83720-0034

SARA J. STAUB, Clerk of the Court

By: Marielle Pratt
Deputy Clerk

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LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN OLSEN
Deputy Attorney General
Chief, Civil Litigation Division
MICHAEL S. GILMORE
ISB #1625; mike.gilmore@ag.idaho.gov
CLAY R. SMITH
ISB #6385; clay.smith@ag.idaho.gov
Deputy Attorneys General
P.O. Box 83720
Boise, Idaho 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 854-8072

DAVID F. HENSLEY
ISB # 6600; dhensley@gov.idaho.gov
Counsel to the Governor
Office of the Governor
P.O. Box 83720
Boise, Idaho 83720-0034
Telephone: (208) 334-2100
Facsimile: (208) 334-3454

Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

WENDY KNOX, and RICHARD DOTSON, Plaintiffs, v. STATE OF IDAHO, ex rel. C. L. OTTER, Governor; BEN YSURSA, Secretary of State; and LAWRENCE WASDEN, Attorney General, Defendants.	Case No. CV-2008-667 JUDGMENT

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Pursuant to the Order dated September 21, 2008, JUDGMENT is entered under I.R.C.P. 58(a) in Defendants' favor, and the Amended Complaint is hereby dismissed with prejudice.

DATED this 25th day of September 2008.

BY THE COURT

DARREN B. SIMPSON
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a full, true and correct copy of the foregoing JUDGMENT was mailed by first class mail with prepaid postage and/or hand delivered and/or sent by facsimile this 25 day of September 2008 to:

Curt R. Thomsen, Esq.
T. Jason Wood, Esq.
THOMSEN STEPHENS LAW OFFICES, P.C.
2635 Channing Way
Idaho Falls, ID 83404

☐ U.S. Mail
☐ Courthouse Box
☒ Facsimile 208-522-1277

LAWRENCE G. WASDEN, ESQ.
ATTORNEY GENERAL
Steven Olsen, Esq.
Deputy Attorney General
Chief, Civil Litigation Division
Michael S. Gilmore, Esq.
Clay R. Smith, Esq.
Deputy Attorneys General
P.O. Box 83720
Boise, ID 83720-0010

☐ U.S. Mail
☐ Courthouse Box
☒ Facsimile 208-854-8072

David F. Hensley, Esq.
Counsel to the Governor
Office of the Governor
P.O. Box 83720
Boise, ID 83720-0034

☐ U.S. Mail
☐ Courthouse Box
☒ Facsimile 208-334-3454

SARA J. STAUB, Clerk of the Court

By: _____
Deputy Clerk

Curt R. Thomsen, Esq., ISB #2072
T. Jason Wood, Esq., ISB #5016
THOMSEN STEPHENS LAW OFFICES, PLLC
2635 Channing Way
Idaho Falls ID 83404
Telephone (208)522-1230
Fax (208)522-1277

Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

WENDY KNOX and RICHARD DOTSON, Plaintiffs, v. STATE OF IDAHO, ex rel., C.L. OTTER, Governor; BEN YSURSA, Secretary of State; and LAWRENCE WASDEN, Attorney General, Defendants.	Case No. CV-08-667 NOTICE OF APPEAL (I.A.R. 17)

TO: THE ABOVE NAMED DEFENDANTS/RESPONDENTS, AND THEIR ATTORNEYS, AND THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants Wendy Knox and Richard Dotson appeal against the above named defendants/respondents to the Idaho Supreme Court from the Order Granting Defendants's Motion to Dismiss with Prejudice, entered in the above entitled action on the 21st day

of September, 2008, and Judgment entered on the 25th day of September, 2008, Darren B. Simpson presiding.

2. That appellant has a right to appeal to the Idaho Supreme Court and the judgment or orders described in Paragraph 1 above are appealable orders under and pursuant to Idaho Appellate Rule 11(a)(1).

3. Appellant intends to assert that following issues on appeal:

(a) That the District Court erred in determining that plaintiff lacked standing.

4. No portion of the record has been sealed.

5. A reporter's transcript is requested; specifically plaintiffs request a transcript of the hearing held on August 18, 2008, on Defendants' Motion to Dismiss.

6. The appellants request the following documents to be included in the clerk's record in addition to those automatically included under Rule 28 I.A.R.:

a. Defendants' Motion to Dismiss and all briefs, memoranda, affidavits, and exhibits filed in support therein; and

b. *Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss* and Plaintiffs' Supplemental Memorandum in Opposition to Defendants' Motion to Dismiss.

7. I certify (a) that a copy of this notice of appeal has been served on the reporter; (b) that the estimated fee for preparation of the Clerk's record has been paid; (c) that the appellate filing fee has been paid; (d) that the reporter or the clerk of the district court has been paid the estimated fee for preparation of the transcript; and (e) that service has been made upon all parties required to be served pursuant to Rule20 and the attorney general of Idaho pursuant to Idaho Code §67-1401(1).

DATED this 21 day of October, 2008.

THOMSEN STEPHENS LAW OFFICES, P.L.L.C.

By: _____
Curt R. Thomsen, Esq.,
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that on the 21 day of October, 2008, I caused a true and correct copy of the foregoing **NOTICE OF APPEAL** to be served upon the following persons at the addresses below their names either by depositing said document in the United States mail with the correct postage thereon or by hand delivering or by transmitting by facsimile as set forth below.

LAWRENCE G WASDEN ESQ ATTORNEY GENERAL STEVEN OLSON ESQ MICHAEL S GILMORE ESQ CLAY R SMITH ESQ PO BOX 83720 BOISE ID 83720-0010	[X] Mail [ ] Hand Delivery [ ] Facsimile 208-854-8072
DAVID F HENSLEY ESQ COUNSEL TO THE GOVERNOR PO BOX 83720 BOISE ID 83720-0034	[X] Mail [ ] Hand Delivery [ ] Facsimile 208-334-3454
SANDRA BEEBE COURT REPORTER 501 N MAPLE 3310 BLACKFOOT ID 83221	[X] Mail [ ] Hand Delivery [ ] Facsimile 785-8057

THOMSEN STEPHENS LAW OFFICES, PLLC

By: _____
Curt R. Thomsen, Esq.

CRT:TJW:RRF:clm
6085\PLEADINGS\006 Not Appeal

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IN THE SUPREME COURT OF THE STATE OF IDAHO

****

WENDY KNOX and RICHARD DOTSON, Plaintiffs / Appellants, -vs- STATE OF IDAHO, ex rel. C.L. OTTER, Governor; BEN YSURA, Secretary of State; and LAWRENCE WASDEN, Attorney General, Defendants / Respondents,	**SUPREME COURT # 35787** **CERTIFICATION OF EXHIBITS ON APPEAL**

I, SARA STAUB, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bingham, do hereby certify, list and describe the following exhibits which were offered or admitted during the proceedings in the above-entitled case:

EXHIBITS/APPENDICES

TITLE

NONE

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Blackfoot, Idaho, this 19 day of November 2008.

SARA STAUB, Clerk of the Court

By _____
Deputy Clerk

****

IN THE SUPREME COURT OF THE STATE OF IDAHO

****

WENDY KNOX and RICHARD DOTSON, Plaintiffs / Appellants, -vs- STATE OF IDAHO, ex rel. C.L. OTTER, Governor; BEN YSURA, Secretary of State; and LAWRENCE WASDEN, Attorney General, Defendants / Respondents,	**SUPREME COURT # 35787** **CERTIFICATION OF CLERK'S RECORD**

I, SARAH STAUB, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bingham, do hereby certify that the above and foregoing record in the above-entitled case was compiled and bound under my direction, and is a true, full and correct record of the pleadings, documents and papers designated to be included in the clerk's record by the Idaho Appellate Rule 28, the notice of appeal, any notice of cross-appeal, and any designation of additional documents to be included in the clerk's record.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Blackfoot, Idaho, this 19 day of November 2008.

SARAH STAUB, Clerk of the Court

Deputy Clerk

****

IN THE SUPREME COURT OF STATE OF IDAHO

****

WENDY KNOX and RICHARD DOTSON, Plaintiffs / Appellants, -vs- STATE OF IDAHO, ex rel. C.L. OTTER, Governor; BEN YSURA, Secretary of State; and LAWRENCE WASDEN, Attorney General, Defendants / Respondents,	)	**SUPREME COURT # 35787** **CERTIFICATE OF SERVICE**

I, SARAH STAUB, Clerk of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bingham, do hereby certify I personally served or mailed, by United States mail, one copy of the clerk's record and the reporter's transcript in the above-entitled case to each of the attorneys of record, to wit:

Counsel for Appellants:	Curt R. Thomsen, THOMSEN STEPHENS LAW OFFICES, PLLC, 2635 Channing Way, Idaho Falls, Idaho 83404
Counsel for Respondents:	Attorney General, Civil Litigation Division, PO Box 83720 Boise, Idaho 83720-0010 David F. Hensley, Counsel to the Governor, PO Box 83720 Boise, Idaho 83720-0034

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Blackfoot, Idaho, this 19 day of November 2008.

SARAH STAUB, CLERK
Clerk of the District Court
By _____
Deputy Clerk